No. 268.

Brf. of Dent for

Filed Jan. 13, 1902.

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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Illinois.

ARGUMENT FOR THE PLAINTIFFS IN ERROR.

THOMAS DENT,
FOR THE PLAINTIFFS IN ERROR.

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TABULAR NOTICE.

PAGE.

STATEMENT OF FACTS .....
Herein of.—Jurisdiction under Section 709, Rev. St. U. S.—Entries of public lands, and the patents therefor under which the adverse parties hereto hold.—Plat of survey of 1834–5. Plat of survey of 1874 of lake bed; which survey the State Court has agreed with this court in *Hardin* v. *Jordan*, and *Mitchell* v. *Smale*, was unauthorized and void.—Different designations of the lake, partly in Illinois and partly in Indiana where it passed under the Swamp Land Act.. 1–5

1. Action in the Land Office, under contests arising from the survey of the lake bed in 1874..... 5–9
2. Litigation resulting from the directions in the Land Office11, 12

(a.) Pleadings in the present case (originally two cases, consolidated later , including references to and reliance upon *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, respectively, by the parties to this record, as per their pleadings.....12, 22

(b.) Of the evidence, and herein of topography of the lake, shallowing influences, islands, stages of water, original meanders in 1834–5. Abstract of sundry maps and tables shown; divers surveys, findings or recitals of supposed conditions; testimony of various observers.....22, 47

(c.) The decree first rendered; which was reversed in part, general directions in the remanding order.....47, 55

(d.) Judgment of Supreme Court of Illinois of reversal in part. 55

(e.) Action following such reversal.....55–9
Application to be allowed to introduce further evidence denied, and application to show final judgment in *Hardin* v. *Jordan* denied 59

(f.) Decree finally rendered by Circuit Court of Cook County.60–8
Assignment of errors in Supreme Court of the state..... 68

(g.) Judgment of affirmance by that court..... 69

(h.) Stipulation of counsel herein as to making up the record for review in this court..... 69
Specification of errors relied upon here.....69–71

PROPOSITIONS ARGUED UNDER THE AUTHORITIES CITED.

I. Right to writ of error after final decision in Supreme Court of the state.....72–5

II. Comprehensiveness of proprietary rights of the United States in respect to non-navigable waters which were within the public domain.....75–8

III. The distinction between navigable and non-navigable waters should be observed in passing upon any claim of the state to the lake bed, and herein of the necessity of tracing title to the latter through congressional action..78–84

PAGE

IV. The meander did not impair the title of the United States nor operate as a conveyance to the state. It was error in the state court to hold otherwise, and out of harmony with its prior decisions, and inconsistent with the contest in the Land Office....84–90

V. The Surveyor General could not make the lake a navigable water. The question whether it was navigable was one of fact. Herein, also, of the contest in the Land Office, and reasons why it binds the state....90–92

VI. The lake was not made a public water....93–103

VII. The ordinary presumption under a deed for a tract bounded by a non-navigable water, is that it conveys land covered with water as far as the grantor owns....103–4

VIII. The State Court did not have power to make the lake a public water....104–110

IX. The ruling of the State Court was inconsistent with the prior decisions, and herein of *Trustees of Schools* v. *Schroll*, and of the common law....110–129

X. The right of this court to determine not only as to the effect of the contents, but also as to the common law, and herein of the right of this court to adhere to its own decisions....130–1

XI. The court is not required to yield to the State Court in determining the effect of land patents, nor is it a matter of local law, as this phrase is applied. The same law governed the Northwest Territory and the states formed therefrom....131–4

XII. The question is one of general law, wherein the state cannot be the supreme arbiter for itself. The state must show a grant....134–7

XIII. The lake as a non-navigable body of water, remained part of the public domain until the government sold the lands bounded by the lake....137–140

XIV. The lake bed was subject to be apportioned under common law rules, and herein of error and uncertainty of dissenting views....141–150

XV. That effect should be given to the plat and field notes as to what were the boundaries, and herein of supposed spurs or ridges and islets or islands (in time). And herein further of apportionment....150–160

XVI. The rulings of this court should have prevailed, and herein further of methods apportionment, and of particulars under the survey, the topographical inquiries, and notes as to elevations, and of the time with reference to which the question as to length of shore frontage should have been referred....160–176

XVII. No claim made for the state should interfere with this court in directing a decree. The state can show no title. It is also debarred by its former contest. The question is much more than one of boundaries....177–186

There is certainty and propriety in the application of the rules of the common law. There is unreasonableness in an attempt to scrutinize and adjust increment as so-called accretions....183–186

INDEX TO MAPS.

		PAGE.
No. 1.	Map of survey of T. 37 N., R. 15, in 1834–5	2
No. 2.	Map of survey of Wolf Lake, in Illinois, 1874	4
No. 3	Map of survey in 1883 by John A. Cole, being Jordan's Exhibit No. 4½, in *Mitchell* v. *Smale*, showing topography of Wolf Lake, in Illinois, and adjacent lands	28
No. 4.	Map of survey in 1886 for road bed for South Chicago and Southern Railroad across Wolf Lake, in Illinois, showing elevation of water with reference to city *datum*, and depth of water, during survey and construction of road bed	41
		38
No. 5.	Map showing Wolf Lake in 1851	39
No. 6.	Map showing Wolf Lake, in Illinois, in 1861	
No. 7.	Map of survey of Wolf Lake, in Illinois, in 1891, by Cole, Alvords & Shields; this being Jordan's Exhibit D. Elevation of water in Hyde Lake 0.373 above *datum*	44
No. 8.	Map showing the divisional lines under the decree of August 11, 1897, taking Jordan's Exhibit D for the purpose of illustration	176
No. 9.	Map showing areas in Wolf Lake unsubmerged south of S. W. ¼ of Sec. 20, and within the lines of the S. W. ¼ of Sec. 20, if extended, when water is at 4 feet above *datum*, according to the elevation shown on Shedd's Exhibit Jordan's Map C	171
No. 10.	Map of original survey of Sections 15 and 16, T. 16 N., R. 3 W., showing part of Meredosia Lake, involved in *Trustees of Schools* v. *Schroll* 120 Ill., 511.	117
No. 11.	Map of part of Meredosia Lake as shown in Report 120 Ill., 511	113
No. 12.	Map of original survey of Sections 5, 6, 7 and 8, T. 23 N., R. 4 E., showing part of "Impassable Lake," partly involved in *Bristol* v. *County of Carroll*, 95 Ill., 84	110
No. 13.	Map of original survey showing northern part of the lake in T. 24 N., R. 4 E., a part of which lake was involved in *Bristol* v. *County of Carroll*, *supra*, said northern part of the lake being in part involved in *Hammond* v. *Shepard*, 186 Ill., 235	108
No. 14.	Map of government resurvey showing west part of lake in Section 6, the east part of which in Section 5 was involved in *Bristol* v. *County of Carroll*, *supra*	114
No. 15.	Map of government survey of lake bed,—*i. e.*, of the lake considered in *Bristol* v. *Co. of Carroll*, *supra*, and *Hammond* v. *Shepard*, *supra*	111
No. 16.	Map showing the general method for dividing the area of the lake as attaching to grants of shore tracts	147
	Table showing certain stages of water in Wolf Lake, as noticed by Surveyor Rossiter	40

Note. Shedd's Exhibit Jordan's Map C is not shown herein. It will be found at page 91 of record.

TABLE OF AUTHORITIES CITED.

TITLE.	OFFICIAL REPORT.	PAGE HEREIN.
1 Am. and Eng. Enc. of Law	2nd Ed., p. 467	185
6 Ib., 290 and note 3		126
Bagnall *vs.* Broderick	13 Pet., 436	83
Barney *vs.* Keokuk	94 U. S., 324	96, 99
Beckman *vs.* Kreamer	43 Ill., 447	110
Boorman *vs.* Sunnuchs	42 Wis., 233	125, 185
Braxon *vs.* Bressler	64 Ill., 488	107
Bristow *vs.* Cormican	L. R. (H. L.), 3 App. Cas	114
Bristol *vs.* County of Carroll	95 Ill., 84	103, 108, 110-13, 138
Brown's Lessee *vs.* Clements	3 How., 665	145, 146
Caldwell *vs.* Jackson	96 Iowa, 414	128
Calumet River Ry. Co. *vs.* Sheaff	164 Ill., 453	107, 115
Canal Trustees *vs.* Haven	5 Gilman, 548	106
City of Chicago *vs.* Laflin	49 Ill., 172	107
Canal Comrs. *vs.* People	5 Wend., 423	120
Carroll *vs.* Lessee of Carroll	16 How., 275	118, 130, 134
Clute *vs.* Fisher	65 Mich., 48	145, 146
Cobb *vs.* Davenport	3 Vroom. (N. J.), 369	77
Coburn *vs.* Harvey	18 Wis., 156	126
Constitution of U. S	Art. IV, Sec. 3, par. 2	81
Coovert *vs.* O'Conner	8 Watts, 470	76
Davis *vs.* Crouch	94 U. S., 514	74
Decision of Commissioner of General Land Office		5–10
Diedrich *vs.* Railroad	42 Wis., 248	125, 126
Dowell *vs.* Applegate	152 U. S., 327	92
Dutton *vs.* Strong	1 Black, 23	97
Edwards *vs.* Ogle	76 Ind., 302	125
Elphinstone on Interpretation of Deeds	182–3	104
Estes & Carter	10 Iowa, 400	127
Fisher *vs.* Perkins (or Carrico Admr.)	122 U. S., 522	72, 74
Forsyth *vs.* Smale	7 Biss., 201	161
Fuller *vs.* Dauphin	124 Ill., 542	89, 144
Fuller *vs.* Shedd	161 Ill., 462	85–7, 107, 136, 140, 142–4, 144, 153
Gazzam *vs.* Lessee of Phillips	20 How., 372	145
Gelpcke *vs.* Dubuque	1 Wall., 175	134
Genesee Chief *vs.* Fitzhugh	12 How., 443	96

TABLE OF AUTHORITIES CITED.—CONTINUED.

TITLE.	OFFICIAL REPORT.	PAGE HEREIN.
Gibson *vs.* Lyon	115 U. S., 439	133
Gibson *vs.* Chouteau	13 Wall., 92	81, 83
Gilmore *vs.* Sapp	100 Ill., 297	83
Goodtitle *vs.* Kibbe	9 How., 471	96
Gouverneur *vs.* Natl. Ice Co	134 N. Y., 355	115, 129
Grand Rapids Ice Co. *vs.* S. Grand Rapids Ice Co.	102 Mich., 227	115, 145
Grand Rapids R. R. Co. *vs.* Butler	159 U. S., 87	158
Hale De Jure Maris, ch. 4	8 Bacon's Abridgement, Bouvier's Ed., 19	184
Hammond *vs.* Shepard	186 Ill., 235	107, 109
Hardin *vs.* Jordan	140 U. S., 371	10, 11, 19, 21, 42, 47, 75, 90, 100, 102, 113–15, 124, 129, 146–49, 155, 161, 163
Healy *vs.* Joliet & Chicago R. R. Co.	116 U. S., 191	93
Hodges *vs.* Williams	95 N. C., 331	138
Hogg *vs.* Beerman	41 Ohio St., 81	103
Houck *vs.* Yates	82 Ill., 179	89, 143, 158
Hubbard *vs.* Bell	54 Ill., 110	93
I. C. R. R. Co. *vs.* People	146 U. S., 387	77
Inhabitants of West Roxbury *vs.* Stoddard	7 Allen, 158	121
Irvine *vs.* Marshall	20 How., 558	82, 83
Johnston *vs.* McIntosh	8 Wheat., 543	80
Jones *vs.* Lee	77 Mich., 35	183
Kanouse *vs.* Slockbower	48 N. J. Eq., 42	77, 115
Kean *vs.* Roby	145 Ind., 221	138–9, 177
Kean *vs.* Calumet Canal & Improvement Co	No. 47 present term	139
Kehr *vs.* Snyder	114 Ill., 313, 316	162
Kent's Commentaries, Vol. 1	*258, 259	75
Kent's Commentaries, Vol. 3	*428	104
Kirkpatrick *vs.* Yates Ice Co	45 Mo. App., 335	78, 115, 158
Lamprey *vs.* State	52 Minn., 181	115, 129
Lender *vs.* Kidder	23 Ill., 49	75
Lessee of Pollard's Heirs *vs.* Kibbe	14 Pet., 353	75
Lincoln *vs.* Davis	53 Mich., 390	145
Lux *vs.* Haggin	69 Cal., 255	103, 123
McComb *vs.* County Comrs	91 U. S., 1	72
Mariner *vs.* Schulte	13 Wis., 775	125
Martin *vs.* Waddell	16 Pet., 410	77, 78, 96
Middleton *vs.* Pritchard	3 Scam., 510	89, 104, 158
Mitchell *vs.* Smale	140 U. S., 406	11, 42, 47, 75, 88, 150, 159–60, 163
Moore *vs.* Willmette Trans. Co	7 Ore., 355	169
Morgan *vs.* Curtenius	20 How., 1	133
Nelson *vs.* City of Madison	3 Biss., 244	133
Niles *vs.* Cedar Point Club	175 U. S., 300	91–2
Noyes *vs.* Collins	92 Iowa, 566	125, 127–8

TABLE OF AUTHORITIES CITED.—CONTINUED.

TITLE.	OFFICIAL REPORT.	PAGE HEREIN.
O'Farrell *vs.* Simplot	4 Iowa, 381	127
O'Gilvie *vt.* Copeland	145 Ill., 98	150
Olsen *vs.* Huntamer	6 S. Dak., 364	115
Ordinance of 1787		79
Packer *vs.* Bird	137 U. S., 661	95, 99, 101, 137
Page *vs.* Peters	70 Wis., 178	83
Paine *vs.* Woods	108 Mass., 160	103
Parker *vs.* The People	111 Ill., 581	106
Parker *vs.* Cutler Mill Dam	20 Me., 353	121
Pass *vs.* McRae	36 Miss., 148	131
Pease *vs.* Peck	59 U. S., 595	133
People *vs.* Bridges	142 Ill., 30	106
Phillips' U. S. Sup. Ct. Prac	206	74
Pollard *vs.* Hagan	3 How., 212	77, 96
Pomeroy on Riparian Rights	p. 46, par. 32	76
President, etc., of Commons *vs.* McClure	167 Ill., 23	76, 158
Rice *vs.* Ruddiman	10 Mich., 125	93
Ridgway *vs.* Ludlow	58 Ind., 248	125
Roe *vs.* Strong	107 N. Y., 350	77
Rogers *vs.* Jones	1 Wend., 237	77
Ross *vs.* Faust	54 Ind., 471	124
Schulte on Aquatic Rights	138	159
Schlosser *vs.* Cruickshank	96 Iowa, 414	128
Seymour *vs.* Landers	3 Dillon, 440	83
Shell *vs.* Matteson	81 Minn., 38	84, 104, 115
Shively *vs.* Bowlby	152 U. S., 1	75, 122
Smith *vs.* Rochester	92 N. Y., 463	114
State of Indiana *vs.* Milk	11 Biss., 197	124–5, 141, 159
State of Indiana *vs.* Portsmouth Savings Bank	106 Ind., 435	124, 128, 139
Steel *vs.* St. Louis Smelting & Mining Co	106 U. S., 447	92
St. Paul & P. R. Co. *vs.* Schurmeier	74 U. S., 272	80, 97, 98
Stoner *vs.* Rice	121 Ind., 51 (6 L. R. A. 387)	145, 146
Town of Roberts *vs.* Bolles	101 U. S., 119	133
Town of Kane *vs.* Farrelly	192 Ill., 521	150
Trustees of Schools *vs.* Schroll	120 Ill., 509	103, 113, 115–22, 124, 130, 131, 177
Tyler on Boundaries	94	159
Warren *vs.* Chambers	25 Ark., 120	119
Washington Ice Co. *vs.* Shortall	101 Ill., 46	106
Webster *vs.* Morris	66 Wis., 366	126
Webber *vs.* Pere Marquette Boom Co	62 Mich., 626	158
Wilcox *vs.* Jackson	13 Pet., 498	82
Wilcox *vs.* McConnell	13 Pet., 516	83
Yates *vs.* Milwaukee	77 U. S., 497	132

ACTS OF CONGRESS.

		PAGE.
As to Waters Navigable and Non-Navigable	Rev. Stat. U. S., Secs. 2476, 5251	78, 94, 98, 135
In re Admitting Illinois to Statehood	"Enabling Act"; (Scates. T. & B.'s Comp., 41), April 18, 1818, and Ill. Ordinance.	79, 116–17
As to Surveys; Directions to Surveyors	May 18, 1796; Rev. Stat. U. S., Sec. 2395	88
Survey of Public Lands	March 3, 1811; Rev. Stat. U. S., Sec. 5251	98
Swamp Land Grant	2 Purple's Comp., 1352; Rev. Stat. U. S., Sec. 2479	8, 86–88, 92, 101, 103, 109, 111–13, 124–5, 140, 177–80
As to Surveys In re Boundary Lines	Act Feby. 11, 1805; Rev. Stat. U. S., Sec. 2396, 2377	167, 177, 79–80
Ordinance of 1787		
Jurisdiction	Rev. Stat. U. S., Sec. 709; Rev. Stat. Ill., Hurd, 1899, 1372 (with Burnt Record cases)	72
Ill. Ordinance accepting "Enabling Act."	(*Ib.*, 27)	79
Act of Virginia and Deed of Cession	Oct. 20, 1783 (Scates. Treat. & B. Comp., 18–20)	75

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Plaintiffs in Error,
vs.
CHARLES B. SHEDD,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

ARGUMENT for the PLAINTIFFS in ERROR.

ABSTRACT OR STATEMENT OF FACTS.

The writ of error in this case is brought for the review of a judgment of the Supreme Court of Illinois, whereby the plaintiffs in error were denied the rights which were set up by them under patents from the United States for certain lands which, when surveyed and sold, bordered upon a non-navigable lake then in the vicinity of Chicago.

The lake, or what remains of it, is now within the limits of that city, except as to that part of the same which was in the State of Indiana.

A claim of proprietorship in the submerged lands by virtue of patents from the United States was denied and overruled by the Supreme Court of the state as inconsistent with the policy of the state concerning lakes meandered in the public surveys.

Map No. 1 herein, representing in outline the fractional township in Illinois embracing the part of the lake which was within that state, is here given, as representing the official plat, but on a reduced scale, and omitting some details.

Entry or purchase from the United States of a part of these lands was made by the late John Holbrook, father of plaintiff in error Gertrude H. Hardin, on the 24th day of December, 1838. (Record, 246.) Patent for the same from the United States was issued to said Holbrook May 20, 1841. (Record, 245.)

For another part of such lands the patent from the United States was issued to William B. Egan on the 1st of August, 1853. (Record, 249.)

The plaintiffs in error traced title under said patents.

The lands covered by the entry by and patent to said Holbrook were in such patent described as follows:

> "The south-east fractional quarter and the east fraction of the south-west fractional quarter of Section nineteen (19), the north-east fractional quarter and the east fraction of the south-east fractional quarter of Section thirty (30), in Township thirty-seven (37) north, Range fifteen (15) east, in the district of lands subject to sale at Chicago, Illinois, containing one hundred and fifty acres and ninety-eight hundredths of an acre, according to the official plat of the survey of said lands returned to the general land office by the Surveyor General."

Three of the fractional subdivisions described in that patent were on the lake. But the other, namely, the east fraction of the south-west fractional quarter of Section 19, being the westerly tract, had its western border on what was known at the time of the survey as the "Little Kalamick River," now known as Calumet River.

MAP No. 1.

LAKE MICHIGAN
OLD INDIAN BOUNDARY LINE
LITTLE KALAMAZOO RIVER
LITTLE
NAVIGABLE LAKE
C. & M. R. R.
6
5
7
8
18
17
19
20
30
29
31
32
A. 87.20
A. 126.07
A. 144.74
A. 160
A. 79.32
A. 38.09
A. 119.50
A. 139.53
A. 96.97
A. 121.42
A. 156.47
A. 97.71
A. 113.60
A. 96.60
C. 26174
A. 111.04
A. 79.11
A. 117.67
A. 161.20
A. 120.72
A. 112.39
A. 7.90
A. 116.86
A. 78.21

The three tracts, so entered by John Holbrook, which bordered on the lake, were the south-east fractional quarter of Section 19 (79.11 acres), the north-east fractional quarter of Section 30 (28.74 acres), and the east fraction of the south-east fractional quarter of Section 30 (2.04 acres), the specified acreage being as per the government plat.

The other tract, a part of which was held by plaintiff in error Gertrude H. Hardin, under the patent to William B. Egan, was described in said patent as follows:

> "The west fraction of the south-east quarter (west of lake) of Section thirty (30), in Township thirty-seven (37), of Range fifteen (15), in the district of lands subject to sale at Chicago, Illinois, containing twenty-five acres and nine-hundredths of an acre, according to the official plat of the survey of said lands returned to the general land office by the Surveyor General." (Record, 249.)

The two tracts of defendant in error, Charles B. Shedd, through title to which the judgment of the State Court gives him a large part of the former lake, were the south-west fractional quarter of Section twenty (20), in said Township and Range (4.53 acres as per the government plat), and Fractional Section twenty-nine (29) in the same township and range (7.37 acres, according to said plat), the former tract having been patented to Horatio B. DeWitt, March 1, 1850 (Record, 57-8), under an entry made at the land office in Chicago July 10, 1848 (Record, 57), and the latter tract having been patented to Stephen A. Douglas, October 1, 1855 (Record, 60), under an entry at said land office May 8, 1855. (Record, 59.)

For convenience of reference a photo-lithographic copy of a part of the official plat of the government sur-

vey of the sections in respect to parts of which there is controversy in this case is here shown (marked Map No. 2).

But in looking at this map it should be borne in mind that the lines crossing the lake, and designed to show land subdivisions within the State of Illinois, were made under a survey which was ordered by the Commissioner of the General Land Office in 1874, after the tracts or fractions bordering on the lake had been sold; which survey has been held by this court, and also by the State Court, to have been unauthorized and void.

It will be noted, also, that such survey of 1874 was, according to the official designation, a survey of "Wolf Lake," then so called; the former designation of "Navigable Lake," however, remaining on the plat.

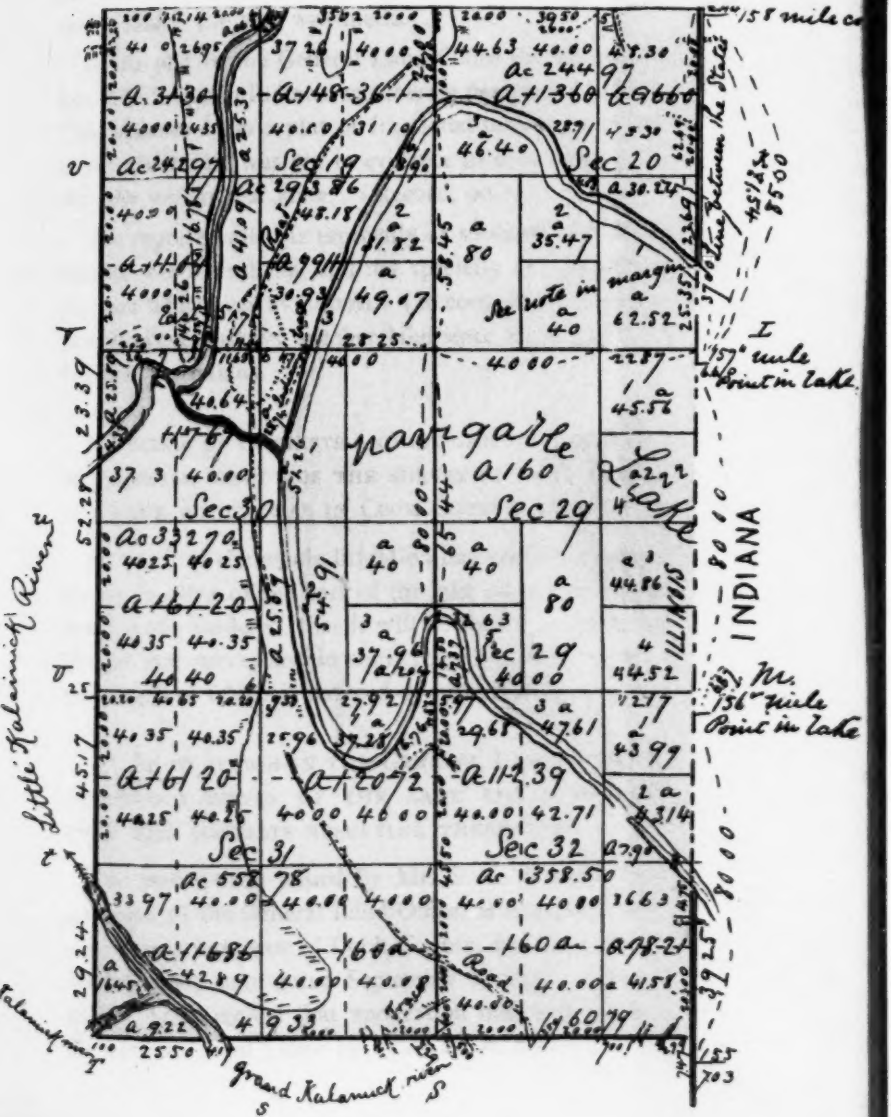
It is here meant that the name of Wolf Lake was then used in the General Land Office and local Land Office to designate the lake.

The survey but protracted the lines across or within the lake.

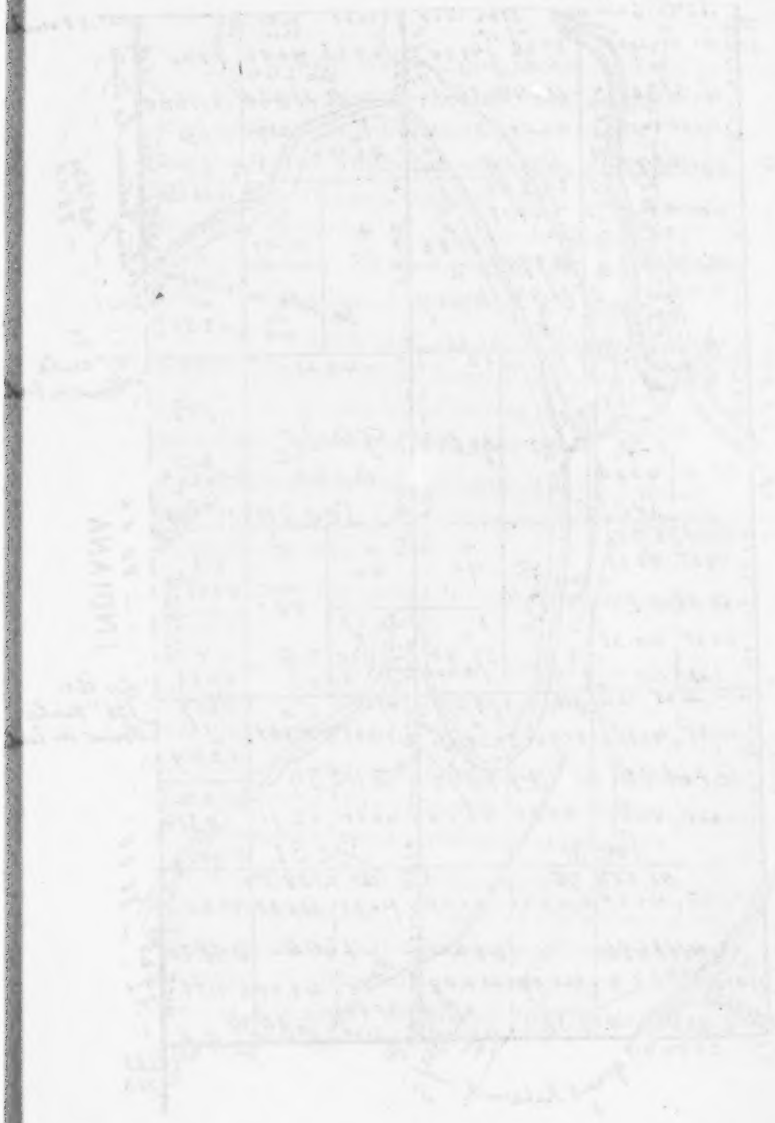
Such survey also accepted the official plat of the earlier survey, to wit: that of 1834-5, as correct, so far as it gave the outlines of the lake. (See "Jordan's Exhibit A," Record, 106-7; said exhibit showing the official plat of the survey of 1834-5, as well as that of 1874, as noted in the memoranda and certificates on the plat.)

It is perhaps much like repetition to say that neither in the official plat, as first made, of the survey of 1834-5, nor in the official plat as made to represent additionally the survey of 1874, was any special name given to the lake. It was simply designated "Navigable Lake."

MAP No. 2.


Sec 19
Sec 20
Sec 30
Sec 29
Sec 31
Sec 32
part gable
a160
Lake
INDIANA
ILLINOIS
Little Kalamazoo River
Grand Kalamazoo River
Road
160 a
160 a
160 a
160 a
1/4 mile
Point in lake
1/4 mile
Point in lake
1/8 mile
Line between No States

7454



But such designation is abundantly shown to have been erroneous, whatever may have been the conception under which the plat was made.

In the plat in the General Land Office the part of the lake which was in Indiana was merely designated "Lake." This appears from a plat of fractional townships in that state; which plat was put in evidence to show the part of the lake within that state. (Record, 90.)

The representation is especially of so much only of the lake as was in Indiana, and not specially or relatively of the part which was in Illinois. (Record, *ib.*) The same plat, however, shows another lake since known as Lake George, in Indiana.

A REVIEW OF CONTESTS AND LITIGATION WHICH WAS THE SPECIAL RESULT OF THE SURVEY OF THAT PART OF THE LAKE WHICH WAS IN COOK COUNTY, ILLINOIS.

So much of the whole litigation has resulted from the survey in 1874 of the part of the lake on which the patented lands bordered, that it will be timely to speak further of that survey,and in some respects of the course of the litigation which it induced or necessitated.

1. AS TO ACTION IN THE GENERAL LAND OFFICE IN ORDERING A SURVEY OF THE LAKE BED IN 1874 AND UPON THE CONTESTS RESULTING THEREFROM.

The instructions issued by Mr. S. S. Burdett, Commissioner of the General Land Office, to Alexander Wolcott, county surveyor of Cook County, for the survey of the lake bed, were dated September 8, 1874. (Record, 388.) They recited that application had been made to the General Land Office by Franklin A. Cleaveland and

others for the extension of the lines of public surveys over "meandered lake," situated in Sections 19, 20, 28, 30, 31 and 32, Township 37 north, Range 15 east, which, according to sworn testimony, had been reclaimed. That the land forming the bed thereof was shown to be fit for agricultural purposes. That $80 had been deposited by the parties interested in the survey to cover the expense of the survey of so much of said sections as was dry land admitting of the running, measuring and marking of the lines of public surveys. That the applicants had named said Wolcott as a proper person for the work, and submitted a proposal by him as to the amount he would charge for the survey. That the commissioner had consented to appoint said Wolcott a United States deputy surveyor for the execution of the work.

Mr. Wolcott was directed, if he accepted the appointment, to identify the meander corners of the original survey of so much of the lake as fell within the State of Illinois; and if the lines along the state boundary were surveyable, he was to extend the line between the States of Indiana and Illinois by establishing the proper mile-post at a point eighty chains north of the 155-mile corner, which he should identify. That he would then prolong the lines interrupted by the lake and cross the same, or so far as the dry land admitted of the establishment of permanent corner boundaries according to the manual of surveying instructions. That each quarter section should have three corners established, and permanently marked and witnessed; this being necessary in order to enable parties to acquire title and procure a patent. It was to be the aim of the surveyor to complete legal subdivisions of the original survey. An extract was furnished Mr. Wolcott of the field notes of the former sur-

veyors; also field books and field note paper on which he was to make returns of the survey. He was to furnish a diagram containing the extent of the reclaimed lands, and was to state under official oath, from such sources of information as might be at his command, whether then at or any former time this body of water was, or actually had been, used as a highway of commerce, or had ever been susceptible of such use.

The lands surveyed in 1874 were found, said the Commissioner of the General Land Office, to

> "constitute the bed of a lake which is known as Wolf Lake, in Cook County, Illinois, shown by the survey of the township in 1835 as a navigable lake." (Record, 91.)

The commissioner declared that:

> "The waters having receded or evaporated, application for the survey of the body of land so brought into existence was made under circular issued from this office July 13, 1874."

Survey under such circular and under the special instructions to Alexander Wolcott, a United States deputy surveyor, was made, and was approved December 31, 1874.

On the 9th of January, 1875, a copy of a plat of this survey was sent to the district officers at Springfield, Illinois, with instructions to notify all claimants for the lands of a day set for hearing testimony regarding claims or contests over the property so surveyed. After such hearing the officers of the Springfield Land Office were to transmit all the proceedings, with their joint opinion thereon, to the General Land Office.

The report of Commissioner Williamson, of the General Land Office, set out in the Record (see pp. 91-106

of Record), proceeds to give an account of a hearing which was had in the Land Office in Springfield, Illinois, February 8, 1875, and succeeding days. The report shows, among other things:

That the plat of the survey of the township was undoubtedly filed in the District Land Office prior to June, 1836; entries of lands thereunder having been made at that time.

That the Illinois Central Railroad Company claimed, as grantee of the State of Illinois, the lands in Sections 20 and 32 under the Act of Congress approved September 20, 1850, granting lands to the State of Illinois to aid in the construction of a railroad from Chicago to Mobile (9 Stat., 466); those sections being within the six-mile limits of that grant, as were also, in fact, all the lands in dispute.

That the State of Illinois claimed for itself the lands in Sections 20, 30 and 32, under the Swamp Lands Act of September 28, 1850 (9 Stat. at L., 519).

That the County of Cook claimed as grantee of the State of Illinois the lands in Sections 19, 29 and 31 under said Swamp Lands Act.

That meanders of what was termed a "Navigable Lake" covering the lands in controversy were surveyed in 1834 and 1835, and by the plat constructed from that survey the officers of the United States had so far been governed in disposing of the lands in the township. That in connection with the claim under the Swamp Lands Grant the testimony was that this land was to a great extent covered with water so late as 1850.

That the tenor of all the evidence was to the effect that the greater part, if not all, of the lands came into exist-

ence some time subsequent to 1850, and prior to the survey of 1874 as a "lake bed," from which, by evaporation or other causes, natural or artificial, the waters had permanently receded, leaving within the unsurveyed area dry land fit in ordinary seasons, for agricultural purposes.

That the survey of 1874 was of the bed of the lake, the lands in which had come into existence subsequent to the original survey.

That it being held that the land was not in existence at the date of the grant under which the Illinois Central Railroad Company claimed, the grant did not attach to it on the subsequent formation or appearance of the land.

That on transmitting the claims and testimony the district officers at Springfield forwarded their joint opinion thereon, which opinion was adverse to the claims of the Illinois Central Railroad Company, the County of Cook, as grantee of the state, and the riparian claimants, these including Gertrude H. Hardin and Horatio B. DeWitt aforesaid. But that such opinion was in favor of certain of the pre-emption and homestead claimants, occupying lots or parcels of the original lake bed surveyed in 1874 as aforesaid.

Proceeding to review the opinion of the district officers at Springfield, the Commissioner, by his said report, affirmed, in the main, the conclusions which they had advised or adopted; thus rejecting the claims of the Illinois Central Railroad Company, the State of Illinois, and the County of Cook, and likewise rejecting, upon the preference given pre-emptioners and homesteaders, the claims of Gertrude H. Hardin and Horatio B. DeWitt. The last named conclusion followed, as a matter of

course, upon the allowing of the pre-emption claims of Andrew Farrand, Alice A. Condit, Solomon Field, John E. Curtis, Chester B. Rushmore and Franklin A. Cleaveland, among others. (Record, 105, 106.)

In brief, the decision of the Commissioner of the General Land Office sustained the survey of 1874, making subdivision of the lake bed.

If we should follow the history as shown by various public documents, it would be seen that the decision was affirmed by Mr. Secretary Schurz, of the Department of the Interior, May 4, 1880, and that Secretary Bell, of the same department, on the 16th of May, 1881, refused a rehearing to Mrs. Gertrude H. Hardin, because she did not appeal from the order of Commissioner Burdett, of December 12, 1874, approving the survey by Alexander Wolcott of the lake bed. Some of the facts appear in *Hardin* v. *Jordan,* 140 U. S., 371.

However, the orders in the General Land Office, and in the Department of the Interior, after the said report or decision of February 12, 1878, are referred to here only incidentally, as having led on to the seeking by the patentees under the survey of 1834-5 of a remedy in the Courts, to be relieved from the burden cast upon them by the General Land Office in ordering and permitting the survey of the lake bed in 1874, and sustaining the pre-emption claims under such survey of the lake bed.

2. As to some branches of the litigation, shown or indicated by the record, resulting from the claims upon the lake bed lands under the survey of the lake bed, in Illinois, under Commissioner Burdett's circular of July 13, 1874.

With a desire to procure relief from the adverse claims set up under such second survey, various ejectment suits were brought in one of the State Courts of Illinois by Gertrude H. Hardin, one of the plaintiffs in error. (Record, 40.) Also an ejectment suit was brought by Charles H. Mitchell, claiming under the first survey. Such ejectment suits were by the defendants therein removed to the United States Circuit Court for the Northern District of Illinois. (Record, 40, 52-3.)

The records therein were finally brought to this court, where the cases appeared as *Hardin* v. *Jordan*, 140 U. S., 371, and *Mitchell* v. *Smale*, *ib.*, 406.

The writ of error in the latter case was here prosecuted by Charles B. Shedd, the defendant in error herein; and he set up the decision of this court, and claimed the benefit of it in this proceeding (Record, 54-55); he being the grantee of Charles H. Mitchell, the plaintiff in said cause. (Record, 14, 59.)

3. Some features of the present case, upon the pleadings in the Circuit Court of Cook County, Illinois.

A remedy which was likely to be more effective and comprehensive than such as would be afforded by ejectment was sought by defendant in error, Charles B. Shedd, in the filing of two petitions in that court.

This was done under the Act of the General Assembly of the State of Illinois, entitled, "An Act to remedy the evils consequent upon the destruction of any public records by fire or otherwise," approved May 9, 1872. Provision was made by said Act, in Section 11, as well as in other sections, for the special proceedings thus begun.

In general character these were chancery proceedings. (Rev. Stat. of Ill., 1899, Hurd, Ch. 116, p. 1372.)

Of the Pleadings.

(a.) The earlier of such petitions became known as the petition of Charles B. Shedd in No. 442 B. R. (burnt records, meaning). (Record, 10-13.) That petition was filed June 29, 1888.

It alleged, *inter alia*, that the petitioner was at the time of the destruction of the records of Cook County, Illinois, on or about the 9th day of October, 1871, the owner in fee simple, and still remained the owner, of Fractional Section 29, Township 37 north, Range 15, east of the Third Principal Meridian. The petitioner traced his title thereto from Stephen A. Douglas by certain mesne conveyances and evidences of title, including the certificate which was issued by the register of the United States Land Office, in Chicago, to said Douglas, on the 1st of October, 1855. The petition alleged that the petitioner was in possession of the south-west quarter of the south-west quarter of said tract so far as the same was not covered by water, except about seven acres thereof in the extreme south-west corner thereof, the possession of which was claimed by Frank I. Bennett; that said Bennett, and James W. Converse and Conrad N. Jordan claimed to have possession of the north half of the south-

west quarter and the south half of the north-west quarter, so far as the same was not covered with water, by William Bush, their tenant; that Andrew Crawford claimed to have possession of the north half of the north-west quarter so far as the same was not covered with water; but as to the lands, the possession of which was claimed by Frank I. Bennett and Andrew Crawford no one was in the actual occupancy thereof, and that the South Chicago and Southern Railroad Company was in possession of a strip of land used for right of way running through a portion of said section.

Sundry persons, besides those just named, were named as defendants, according to the said Act of the General Assembly of Illinois; and among the persons so named were Gertrude H. Hardin and Conrad N. Jordan. (Record, 13.)

The description given in the petition of the lands of which the petitioner claimed to be the owner was, in substance, the same description which was given in the patent to Stephen A. Douglas. (Record, 10, 60.) But from the recitals as to the claims by Frank I. Bennett, James W. Converse, Conrad N. Jordan, Andrew Crawford and the South Chicago and Southern Railroad Company, it may be said to appear, on looking at the plat, that the petitioner claimed the whole of Section 29, not only the part which was represented on the plat of the survey of 1834-5, but also the parts which were represented by the plat of the survey of 1874, extending lines through the lake.

The second of such petitions was filed June 30, 1888. The case under it became known as No. 443 B. R. (Rec-

ord, 14.) In this petition he, the said Charles B. Shedd, claimed to be the owner in fee simple of

> "the fractional south-west quarter of Fractional Section 20, in Township 37 north, Range 15, east of the Third Principal Meridian (including and embracing the west half of said south-west quarter and the south half of the east half of said south-west quarter, and Lot 2 of the said south-west quarter, according to and as described in the survey of said lands by the officers of the United States Land Office in the year 1874)."

The recitals indicate that the claim of the petitioner was for the whole of the south-west quarter of Section 20, not only that which was embraced within the survey of 1834-5, but also that which was included in said survey of 1874.

The petitioner traced title from Horatio B. DeWitt aforesaid, and recited the aforesaid patent to said DeWitt for the south-west fractional quarter of Fractional Section 20.

By the latter petition both the present plaintiffs in error were, with Conrad N. Jordan and others, made defendants.

In answer to the petition in No. 442, said Gertrude H. Hardin alleged, among other things, that the title of the petitioner to any portion of Fractional Section 29 was limited to a tract of about seven acres in the south-west corner thereof, together with such rights as the law conferred upon him to the bed of the lake abutting upon said seven acres; and that the said petitioner was only entitled to such portions of the lake bed as might not conflict with the rights of other shore owners, and more especially with the rights of said Gertrude H. Hardin.

The respondent claimed to be the owner in fee of a large portion of Section 29, the same being a part of the lake bed, a part vesting in the respondent by reason of the original title of John Holbrook through whom she traced title, as to the tracts entered by and patented to him as aforesaid.

The respondent stated that there should be a fair adjustment of the rights of the petitioner and of the respondent in respect to the lake bed, and that the lake bed, as shown upon the plat of the original survey, should be fairly divided. Respondent referred, also, to her answer to the petition of said Shedd, in No. 443 B. R., it containing recitals applicable to both cases.

In the latter answer said respondent claimed to be the owner in fee of the lands described in the aforesaid patent to John Holbrook, except a certain right of way of the South Chicago and Southern Railroad Company (now known as the Calumet River Railroad Company), running through fractional south-east quarter of Section 19, and fractional north-east quarter of Section 30, and also except a strip, theretofore conveyed to the Cook County Canal and Dock Company, of 400 feet in width, north and south, extending from the Calumet River eastward to the center of Wolf Lake, the south line of said strip corresponding with and being in part a prolongation of the south line of the south-east quarter of Section 19.

The suggestions of this answer, as to the surveys, the topography of the lake region, and other details, will be noticed later under another head.

The answer submitted that there should be a fair adjustment of the rights of petitioner Shedd, and of the respondent.

This answer referred (Record, 29), to five ejectment suits which were brought by said respondent October 27, 1882, against parties claiming to be in possession of portions of the lake bed represented on the plat of the survey, which suits were removed to the United States Circuit Court for the Northern District of Illinois as aforesaid; and also referred to the fact that the judgment in such cases (which had been consolidated under the title of *Hardin* v. *Jordan*) was subject to review, and to be reversed by this Honorable Court, upon a writ of error then pending. (The case was *Hardin* v. *Jordan*, 140 U. S., 371.)

The answer of the Cook County Canal and Dock Company to the petition of said Charles B. Shedd referred to and adopted the answer of Gertrude H. Hardin, and claimed the benefit of the conveyance to said company by Gertrude H. Hardin of a strip of land described in her answer, the same being 400 feet in width extending from the Calumet River eastward to the center of Wolf Lake, and bounded as has already been stated.

The two cases so begun by Mr. Charles B. Shedd, defendant in error herein, were consolidated. (Record, 55.)

A supplemental petition of Charles B. Shedd in the consolidated cases was filed September 21, 1891.

In such petition, after referring to the fact that Conrad N. Jordan, a defendant in said cases, had in his pleadings relied upon and set up in bar the judgment of the United States Circuit Court for the Northern District of Illinois, rendered the 1st of February, 1886, in *Mitchell* v. *Smale*, the late Judge Gresham presiding, the petitioner proceeded to state that a writ of error was sued

7461

out for the reversal of such judgment, and that this court, upon hearing the writ of error, reversed said judgment, and remanded the cause to said Circuit Court, with directions, under which directions, to wit: on the 12th of June, 1891, a judgment was rendered by said Circuit Court, which said judgment was for said Charles B. Shedd for said fractional south-west quarter of said fractional section 20, together with all riparian rights, privileges and benefits incident to the position and location of said lands with reference to Wolf and Hyde Lakes. This supplemental petition insisted that said defendant Jordan had no title nor interest in the lands claimed by him, and that the survey of 1874, as set up by him, was void; and said petitioner, Charles B. Shedd, relied upon the judgment in said case as an estoppel of record, precluding said Jordan and the other defendants in said suit of *Mitchell* v. *Smale*, and others, from asserting any title or interest to or in south-west fractional quarter of Section 20, or in fractional Section 29, or any part thereof, under the said survey of 1874. (Record, 55.)

Amendments to the answer of Gertrude H. Hardin were made August 13, 1891; in which said amendments said Gertrude H. Hardin stated that prior to the survey by the United States the proprietary right in the lands in question and to the lake bed was in the United States; that after the original survey the lands in Township 37 North, Range 15 East, were regularly brought into market, in pursuance of the act of Congress in such case provided; that the same were sold and granted by the United States according to the plat of the survey thereof returned to the General Land Office by the Surveyor General, and without any reservation on the part

of the United States in respect to the lake bed, or any part of the same; that the patentees or their grantees and assigns became and were seized of all the proprietary right in respect to the lake bed which had previously been in the United States; that the United States could not, after having disposed of its proprietary rights, interfere in any manner with the rights of the patentees, including said John Holbrook; that the attempted survey of 1874 was wholly unauthorized and irregular; that the original survey as represented by the plat thereof was not subject to be superseded after the United States sold and conveyed the lands according to such plat. That the rights of the patentees were fixed by the common law, and that the method of adjustment of the lines extending into the lake, or through or over the body of water represented on the plat as a lake, was governed by said law, and that under and by virtue of the patent said respondent claimed to the center of the lake.

That at the time of the original survey of the township, and for many years thereafter, the lake was the receptacle for the waters falling in a considerable district of country; that some of the conditions pertaining to the lake had greatly changed prior to 1874, which was a period of low waters in that vicinity; that respondent believed the original survey to be fair and regular, and not liable to any just exception; that it was not in the power of respondent to state all the conditions existing at the time of the original survey; that the supposed survey of 1874 was based upon a false theory, to wit: on the theory that the meander of the lake, although not represented on the plat, became a boundary, and also under another false theory and assumption, to wit: that the United States had reserved the lake. (Record, 31.)

That in *Hardin* v. *Jordan, supra,* the judgment of the Circuit Court of the United States for the Northern District of Illinois, set up adversely, had been reversed by the Supreme Court of the United States, and that in accordance with the order remanding the case to said Circuit Court a judgment was rendered in the latter court on the 10th of June, 1891, in favor of said respondent, Gertrude H. Hardin, that she was entitled to recover the premises described in the declaration. That in and by this judgment it was found that this respondent, the plaintiff in said case, was seized in fee simple of such premises, and that the south-east fractional quarter of Section 19, the north-east fractional quarter of Section 30, and the east fraction of the south-east fractional quarter of Section 30, were bounded by or situated on a lake which was and is non-navigable, and that she, the plaintiff in said ejectment suit, had the rights of a riparian proprietor in respect to said lake; that her seisin as to the two first named tracts extended to the center of Wolf Lake, and that as to the east part of the south-east fractional quarter of Section 30, such seisin extended to the middle of the bay or projection of the lake in front of the same.

The answer asserted that the judgments in the Supreme Court of the United States, and in the Circuit Court of the United States for the Northern District of Illinois, construed the patent to said Holbrook, and held that the same gave rights to the lake bed to the center of the lake; and respondent relied upon the adjudication in said case. The answer also stated that it was true, as found in said case, that the lake was and is a non-navigable lake. (Record, 33.)

The answer also claimed all of the south half of Section 30, which was east of a line drawn north and south at a distance of eighty rods east of and parallel with the north and south center line of said Section 30 (Record, 33); this being partly under a conveyance to respondent, Gertrude H. Hardin, by William H. Rand and wife, and Nelson A. Steele and wife, in their own right, and as executor and executrix of the last will and testament of Charles R. Steele, deceased, dated December 20, 1889.

Title under this deed was traced in an amendment to the cross-petition of said Gertrude H. Hardin, November 20, 1891. The title was traced by certain mesne conveyances from the entry made by William B. Egan, at the Land Office in Chicago, February 25, 1853, and from the patent to said Egan, dated August 1, 1853. (Record, 45.)

Such cross-petition set forth jurisdictional allegations under the Burnt Records Act, and claimed ownership in fee by said Gertrude H. Hardin of the property covered by the aforesaid patent to John Holbrook, including, also, a large part of the south-west quarter of Section 20 and of Section 29, the Congressional lines of the original survey to be extended into the lake; and further claimed that said Gertrude H. Hardin was "owner in fee to the center of said lake." (Record, 40-41.)

By the amendment filed August 13, 1891, said Gertrude H. Hardin alleged that proprietary right to the lands in question and to the lake bed was in the United States when the lands were first surveyed and platted, and passed to the patentees, including John Holbrook. That the survey of 1874 was unauthorized. That said Gertrude H. Hardin also set up claim to the center of

the lake as following from or growing out of the grant made by patent of land bordering on the lake. The judgment of the Circuit Court of the United States rendered June 10, 1891, under the mandate in *Hardin* v. *Jordan, supra,* as aforesaid, was in this amendment set up and relied upon; and affirmative relief was asked, as applicable to the aforesaid tracts in Sections 19 and 30, respectively, and as to such portions of the bed of the lake, as shown in the plat of the original survey, as said Gertrude H. Hardin should have as the owner and proprietor of lands bordering upon the waters of the lake.

This cross-petition made a large number of persons, including said Charles B. Shedd, defendants, and made reference to the answer of said Gertrude H. Hardin to the petition in 443 B. R., and asserted a claim of ownership to the center of the lake under the patent for the lands represented on the plat as bordering on the lake.

The answer of Charles B. Shedd to the cross-petition of Gertrude H. Hardin disclaimed any interest in the lands as described in the patent to John Holbrook, except such rights as said Shedd might have as riparian owner of the lands previously referred to by him as being owned by him, to wit: South-west fractional quarter of Section 20, and Fractional Section 29, and denied any right of Gertrude H. Hardin as owner of any part of the land so claimed by him in his original petitions.

Certain allegations in the pleadings on the part of Mrs. Hardin as to a narrow spur or promontory extending in a southerly direction from the south-west fractional quarter of Section 20 were admitted, as were also certain allegations as to why it was unnecessary for the United States Surveyor to survey such spurs. (Record, 50.)

Further mention of the extent of the spur and of the space between it and Fractional Section 29 (Record, 50) and east fraction of the south-east fractional quarter of Section 30, will hereafter be made, both as to pleadings and evidence.

Issue was joined as between petitioner Shedd and respondent Gertrude H. Hardin by the replication of said Shedd. (Record, 51.)

Issue was in like manner joined under the cross-petition of said Gertrude H. Hardin. (Record, 50.)

OF THE EVIDENCE.

(b) A hearing was had in the Circuit Court of Cook County, Illinois (the Honorable Murray F. Tuley, Judge, presiding), which was begun at the October term, 1891, of said court.

Petitioner Shedd introduced in evidence a certified transcript of a receipt from the Receiver at the Land Office in Chicago, Illinois, July 10, 1848, showing that Horatio B. DeWitt had made full payment for the south-west fractional quarter of Fractional Section 20, Township No. 37 North, Range No. 15 East, containing 4.53 acres, at the rate of $1.25 per acre. (Record, 57.) Also an exemplification of a patent from the United States to said Horatio B. De Witt for the same land, March 1, 1850. The title in said Shedd was traced under said receipt and patent. (Record, 58-9.)

Also he introduced in evidence a certified transcript of the register's receipt issued at the Land Office, at Chicago, May 8, 1855, to Stephen A. Douglas, showing the purchase by said Douglas of the lot or Fractional Section No. 29, in said township and range, containing 7.37

7464

acres, at the rate of $2.50 per acre. (Record, 59.) Also a certified transcript of a patent from the United States to said Stephen A. Douglas, October 1, 1855, describing the land as "Fractional Section 29", etc. (Record, 60.)

Title in said Shedd was traced under the said patentee by certain mesne conveyances. (Record, 61.)

Also the petitioner introduced in evidence a certified copy of the field notes of the original survey in 1834-5 of Sections 19, 20, 30, 31, and 32, and of the meanders of the lake. (Record, 62-70.)

The complexion of the case, on the hearing had in the Circuit Court of Cook County, was mainly that of a contest of claims based on the survey in 1874 of the lake bed.

A great deal of testimony bearing, or supposed to bear, upon those claims, was introduced.

The testimony of fifteen or more witnesses, called for oral examination in court, or examined by deposition, in behalf of Conrad N. Jordan, Franklin A. Cleaveland, or other of the claimants under said survey of the lake bed, is embodied in this record.

The theory of the parties calling those witnesses was that the meander of the lake in the surveys of 1834-5 signified a reservation of it by the United States, and further that the survey of the same, as public land in 1874, could in a measure be justified by showing land within the lake limits susceptible of use or cultivation. There was also an effort to support a defense under the limitation laws of the state.

The claimants under the survey of 1874 sought to show that in the area represented by the official plat as a

lake there were as early as 1874 quantities of land which by the recession of waters had become unsubmerged, or which had generally been unsubmerged. They contended, therefore, that the United States then had a right to survey and offer for pre-emption or sale the lake bed as a part of the public lands.

In showing the topography of the lake bed, it was the object of the claimants to show, if possible, a right to hold all that was meandered.

We have, besides, in this record, the testimony of nine or ten witnesses called in behalf of Mr. Shedd, the present defendant in error, explaining to some extent the topography or characteristics of the lake bed; and, on the other hand, the record contains the testimony of about eight witnesses on the part of Mrs. Hardin, plaintiff in error, bearing upon such matters.

In view of the fact that the survey of 1834-5 was held to be good and sufficient, and that the attack made upon it by the claimants under the second survey was held to be unwarranted, a minute abstract of much of this testimony would seem to be unnecessary; for considerable portions of it have but little, if any, bearing upon the questions to be discussed in this case.

The parties now before the court are so far governed by the official plat of the survey of 1834-5 that they cannot seriously question it or dispute its general correctness.

Upon observing the map of the survey of 1834 (see map No. 1 *ante*, or map between pp. 106 and 107 of record, or map between pp. 60 and 61 of record), it will be seen that the fractional township surveyed was one, to a great extent, of

low or wet lands. Almost the entire area would seem to have been submerged or overflowed by the waters of the "Little Kalamick River" and the then so-called "Navigable Lake." Evidently the territory as a whole was low or marshy.

The contour lines on each side of the river, and of the marsh extending two miles northward from the lake, indicate low, swampy ground. Low lands seemed to extend south from the lake also to the Grand Calumet River. (See said map.)

In 1868 or 1869 the government commenced work for the improvement of the Little Calumet River and the harbor at its mouth. (Record, 291-2.) This, with other causes, seems to have had a great effect upon the flow of water from the Calumet River into Lake Michigan, the drainage of the district and the recession of the lake. (*Ib.*, 292.)

Prior to the improvement by the Government of the Calumet River and harbor, a bar existed at the mouth of the river. The action of the waters of Lake Michigan created the bar, by piling sand across the mouth of the river, and obstructing the outward flow of water in the river. (Record, 291-2.)

The water of the river being thus held in check, would set back and overflow the adjacent low lands and also run into Wolf Lake. (Record, 164, 292-3.) The deepening of the river, and opening of its mouth, lowered Wolf Lake, and prevented the flow from the river to that lake, which flow was formerly of frequent occurrence. (Cross-Ex. by Mr. Shedd's counsel of witness Rosenquist; Record, 255.)

The Little Calumet River (now generally known as

Calumet River) has its source in Indiana, whence it flows about forty miles prior to the augmentation of its waters by the junction with it of the Grand Calumet River at a point about a mile south-west of Wolf Lake. The source of the latter river or branch is also in Indiana. The Grand Calumet runs parallel to some extent with the (Little) Calumet River, a distance of about twelve miles, until such junction is formed; this being near the south line of the fractional township in which the lake here in question is situated. (Record. 61, 306.)

The effect formerly existing might, to some extent, in high stages of water in Lake Michigan be experienced since the improvement of the river by the Government. (Record, 164, 197.)

During low water periods in Lake Michigan the water of Wolf Lake, and in the marshes, would from evaporation, especially in dry seasons, become lowered. Mr. Shedd, the defendant in error, testified that in such seasons the lake being land-locked, and evaporation great. the water would lower and dry up quickly. (Record, 89.) Prevailing north winds would at times cause the water of Lake Michigan in its southerly part to rise and set back, and the effect would be observable upon Wolf Lake and the adjacent marshes. Nor did the influences of Lake Michigan and the Calumet River stand alone; for Wolf Lake was influenced from other causes, such as rainfall and the melting snows. Evidently in earlier times Wolf Lake was the natural receptacle for the water from much territory in nearly all directions. (Record, 73.) The lake was often higher than Lake Michigan; and the small outlet extending from the west into the Calumet River, being only forty links wide, became subject to be much obstructed (Record, 69, 73);

and action on Wolf Lake in sympathy with the Little Calumet thus became slower or less certain.

At times of such obstruction the water in Wolf Lake would reach a level as high as from six inches to five feet above Lake Michigan. (Record, 284.) When the bar at the mouth of Wolf River (through which there might be made a direct connection with Lake Michigan) would be cut, so as to open a channel, the water of Wolf Lake would be lowered rapidly, to bring it more nearly into a level with Lake Michigan. (Record, 122.)

Mr. Shedd, the defendant in error, having ice houses on the north shore of the lake, frequently made the opening to let the water out. (Record, 78-9.) But during a period longer than twenty years, he said he had never seen the water flow through the bar at the mouth of that arm from natural causes, unassisted. (Record, 80.) He had, when a channel was opened to Lake Michigan, seen the water carry out the sand in large quantities; a stream of water running into that lake that could be seen a long distance; the water in Wolf Lake at such times seeming to be a good deal higher than in Lake Michigan.

The fluctuations of Lake Michigan covered an altitude of about seven feet, ranging as high as five feet above a bench mark commonly called *datum* (Record, 175), and as low as two feet below *datum*. (Record, 176.) This bench mark was established in 1847 as a base from which to estimate elevations for many purposes; and the city has since 1855 kept a record of the elevations of Lake Michigan. (Record, 61.)

Fluctuations in Lake Michigan are somewhat attributable to the precipitation of rain and snow, the records

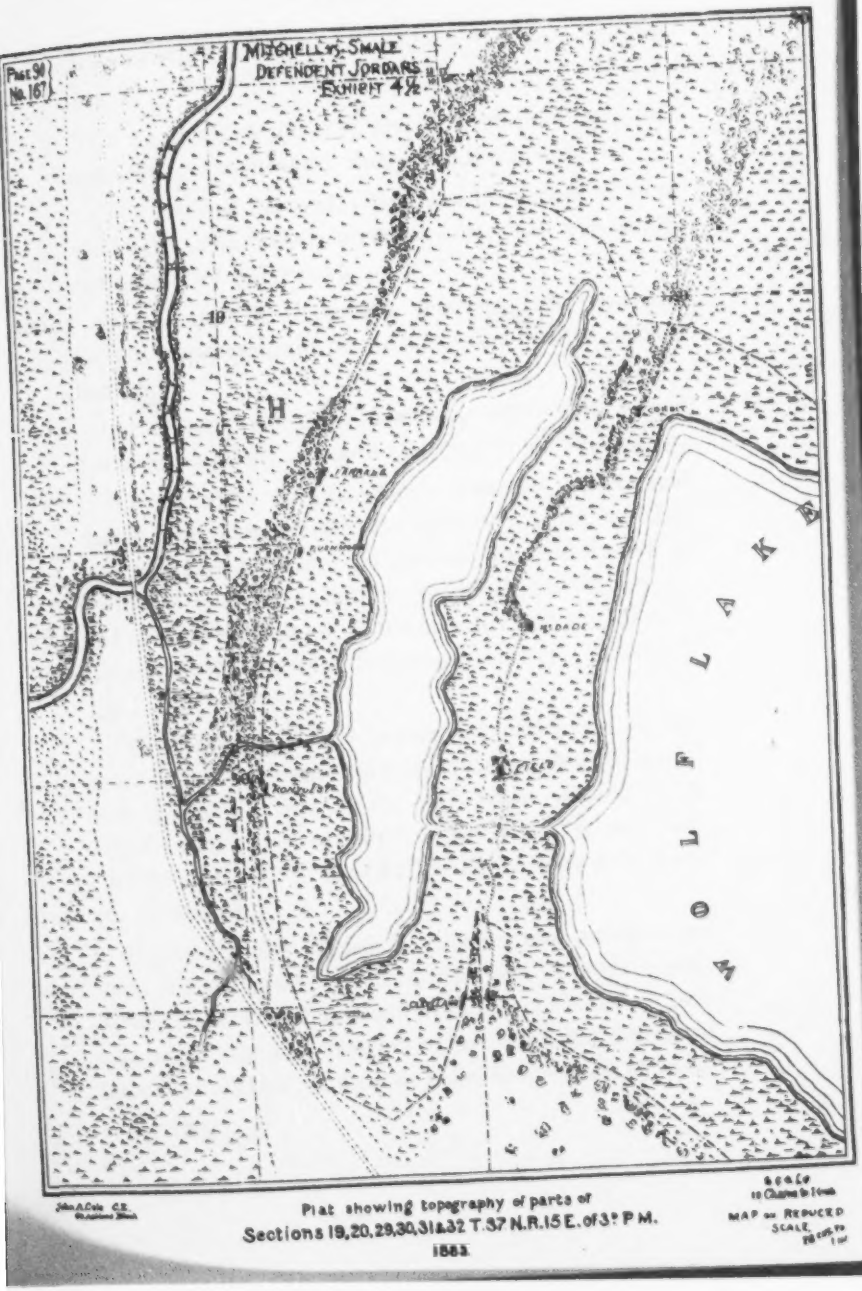
seeming to indicate periods during a series of years of high water and corresponding periods of low water, the high water periods probably being the longest. (Record, 285, 324.) The average elevation of the water for a period of thirty years is said to have been two feet above city datum (Record, 174), and the yearly average of some years is stated as 2.9 and 3.0 feet above datum. (Record. 175.)

The water of Wolf Lake was sometimes reduced by the action of the claimants under the survey of 1874, by opening a cut from the arm Wolf River to Lake Michigan. Wishing to have land uncovered for use, they would cut through the bar at Lake Michigan. In one instance, the height of the water was thus reduced as much as thirty-three inches (Record, 118, 122), making a channel 100 feet wide and 12 feet deep into Lake Michigan. (Record, 118.)

Some of the pre-emptors or patentees under the survey of 1874 had prior to such survey squatted upon slight margins or sinuosities of the shore near the original meander line, and some upon islands and areas brought into existence by the recession or evaporation of the water (Record, 92), within the original lake bed. These houses are shown on a map marked "Jordan's Exhibit 4½" (being an exhibit on behalf of Jordan in *Mitchell* v. *Smale*) and "Hardin's Exhibit 1, Cole." (Record, 173.) (Map No. 3 herein.)

JORDAN'S EXHIBIT 4½ AND HARDIN'S EXHIBIT 1, COLE.

MAP No. 3.



SPECIFICATION OF LOCATIONS MADE UNDER THE SURVEY OF 1874.

On the shore of the lake, and close to the dotted line representing the meander line, were the houses of:

(1) Andrew Farrand, who under the survey of 1874 was by the Land Officers awarded Lots 1 and 2 in south-east quarter of Section 19;

(2) Chester B. Rushmore, awarded under said survey Lot 1 and east half of the north-east quarter of Section 30;

(3) Joseph Konyvesy, claiming under said survey Lot 2 in west half of south-east quarter of Section 30;

(4) Franklin A. Cleaveland, awarded under said survey north-east quarter of south-east quarter, and Lot 3 of south-east quarter of Section 30. and Lot 1 of north-east quarter of Section 31; house on Section 31, and barn on Section 30, at the meander line and close to the section line between Sections 30 and 31. (Record, 139.)

(5) Solomon Field was awarded, under said survey, south half of north-west quarter and north half of south-west quarter of Section 29. His house was on "Elm Island," sometimes so-called. (Record, 375; see, also, "Jordan's Map C," "Shedd's Exhibit": Record, between pp. 90 and 92.)

This island was subject to entire submergence in periods of high water. (Record. 391, 320.) South of and between Elm Island, or Field's place, and Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30, a cut or channel was made by hunt-

ers for the passage of small skiffs across what was at low water a marsh (Record, 289, 352); the bed of the lake here being lower than it is either north or south. (Record, 165.) The cut or channel is shown on the Cole map. (Record, 173.) (Map No. 3 *ante*.)

Mr. Shedd testified that the higher ground comprising Fractional Section 29 extended 600 or 800 feet or more north of the south line of said fraction. (Record, 73.) The distance stated is something less than the length of the line which was run, as per the field notes, from the corner of Fractional Sections 29 and 30 northward to the intersection of the bank of the lake; such line being in length 14.50 chains (or 957 feet). (Record, 66.)

(6) North of Elm Island or Field's place, Lyman D. McDaid, who claimed the north half of north-west quarter of Section 29, had squatted, having a small shanty on a narrow strip called by one of the witnesses "Crescent-Shaped Island." (Record, 286.)

(7.) North of this "Crescent Shaped Island" was another narrow area upon which Alice Condit had squatted, claiming the whole of the south-west quarter of Section 20, except the small area in the north-east corner patented to DeWitt.

West and north of the Condit house was another small narrow area. Both these areas were above the level of the bed on either side; the westerly area being subject to complete submergence in certain stages, and the easterly one also being subject to submergence north of the Condit house at certain stages; the space upon which the house stood, and for a short distance south, being like an island. (Record, 91; Shedd's Map C.) The area

7469

north of the house, and south of the DeWitt tract, was lower than either of those tracts. (Map C.)

These areas, and in general the bed between Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30 and the fractional south-west quarter of Section 20 (the DeWitt tract), were higher than the bed of the lake on either side thereof. There was a tendency, especially in low water, to cause a separation of the lake into two bodies. (Record, 325.) When the water stood at 2.5 feet above city *datum*, it was one lake. If, however, the water fell to within 2.0 feet above *datum*, there would be a divide as if into two lakes. If at one foot above *datum*, there would be a larger divide. The westerly lake was the most shallow, and would be divided into small ponds when the water reached one foot below *datum*. (Record, 324.)

Some of the squatter claimants (Cleaveland, Rushmore, Smale and Munhoven) assisted in making the survey of 1874 by Wolcott; sometimes by wading the lake; at times through water as high as their chins. (Record, 141-4.)

Soon after Mr. Field settled on his pre-emption claim, embracing 160 acres in Section 29, to wit: South half of north-west quarter and north half of south-west quarter, he constructed a road south from his home (on "Elm Island") across the marsh (part of the bed of the lake), and built a bridge over the small channel which had been made by hunters. (Record, 379.) He also extended the road to a point north of the Condit house. (Record, 116.) Such road ran lengthwise over the "crescent-shaped island," and then across to the narrow area upon which the Condit house was situated; the space between

being filled with earth, corduroy, brush and hay. Much testimony was introduced by Mr. Shedd to show this artificial connection. Besides his own testimony as to the wet and swampy condition between the two higher elevations (Record, 72, 404), he introduced testimony of three witnesses; one of whom was his business associate, Mr. John S. Field, to show that the water covered at times this area. Other testimony was also of the same purport.

Surveyor Rossiter, testifying on behalf of Mr. Shedd, said that recently, it being during the trial, he had examined for Mr. Shedd the artificial conditions, and had taken elevations thereon, and of the locality, with reference to city *datum*. (Record, 369, 370.)

The road constructed by Field is shown on the Jordan-Cole map. (Record, 173.) This road does not appear to be shown on the topographical Map C. (Record, 91.)

South of the Condit strip along the road, in the intervening space between that strip and "Crescent-Shaped Island," there were small trees of recent growth, like poplar and willows. (Record, 181.) On the Condit strip and at the south end of the "Crescent-Shaped Island" there were elms.

Looking further at the Cole map (Record, 172-3, Map No. 3, *ante*), we shall see two narrow strips shown in darker and closer characters than those which represent marsh, both extending southerly from near the center of Section 20, and the westerly one of which is short. These (speaking of the outlines on the map), indicate higher elevations than those of the bed of the lake or of the marsh on either side, and the characters used represent them as having a growth of trees or shrubs.

The two strips join or become one strip at or near the meander line near and south of the center of Section 20, where for some distance both north and south of the meander line the area or strip is shown as a plain, or as marsh, without trees or shrubs, and in this respect like other parts indicative of low or marshy features.

It should be borne in mind, in considering the Cole map lately mentioned, that it purports to represent conditions as of 1883, and not as of 1834. A considerable part of the area between the two bodies of water is indicated by this map as being a swamp or marsh which might be taken as part of the lake under ordinary circumstances. (Record, 173.) The water lines represent the open water of the lake free from exposure therein of marsh growth. (Record, 169.) In bringing the map to a reduced scale to fit into the record, the location of the houses of squatters is indistinct. But on the map (No. 3) *ante* we have indicated for convenience of reference the houses in red color.

The general correctness of the original survey in running the lines and fixing outer half-section corners appears from the evidence, and when the surveyor notes that a line was run to the margin or border or bank of the lake at a certain point, and that corners to the fractional quarter section were established, such was the case. (Record, 65, 66, 67, 68, 309.) Likewise, the protraction in the General Land Office of the half-section lines to the lake seems to have been accurate. Surveyor F. C. Rossiter found the corners stated by the field notes to be by the margin or border of the lake correct. (*Ib.*, 312.),

ELEVATIONS OF THE WATER OF THE LAKE WITH REFERENCE TO CITY DATUM PRIOR TO THE SURVEY OF 1874 DO NOT SEEM TO HAVE BEEN TAKEN.

The stage of water existing at the time of the survey of 1834 is, however, disclosed in some measure by the Field Notes. For example, the depth of the water in certain places through which section lines were run is stated in some instances, as is also the character of some of the land traversed in the survey. In one instance, having reference to a line run south between sections 19 and 20, where there are three calls, the Deputy Surveyor, in closing his reference to the third call, said, "marsh water from 6 to 40 inches deep." (Record, 68.) This appears to show that the water was not less than five and one-half feet above city *datum*. (Record, 315.)

Again, in running the meander line along the northerly margin of the lake along fractional section 20, the notes say the land was all marsh, and that the water was from six inches to three and one-half feet deep (Record, 70); and as the evidence shows that the highest elevation on the line run is 5.7 above *datum* (Shedd's Exhibit "Jordan's Map C," Record, 91), we have but to assume the elevation to be substantially the same now as then, and it would follow that the water over part of this line was as much above *datum* as is above suggested, if not more. Demonstration of like height of water to that existing in 1834 is furnished by the testimony of Mr. Shedd, who said the present depth of the water in Wolf Lake would not exceed, in any part of the lake, three feet or three and one-half feet (if there was that much), though sometimes he had seen it eight feet deep in places. (Record,

74.) The evidence shows that in consequence of a dam obstructing the flow of water through a cut or channel south of Elm Island, and from the pumping of water from Lake Michigan into Wolf Lake by Mr. Shedd's ice company, for ice purposes, the water was higher in Wolf Lake than in the cut west of the dam (or in Hyde Lake) by twelve inches. (Record, 369.) A witness who gave the levels for two days, near the time he was testifying, said that Hyde Lake was two inches below *datum* and Wolf Lake was 3.28 inches above *datum*. (Record, 326-7.)

From these figures it is shown that the elevation of the bed of Wolf Lake east of the supposed ridge or strip is about two feet below city *datum*, and in the few places where the water was eight feet deep the height of the water would reach six feet above *datum*.

A SECOND MEANDER IN PART OF THE LAKE.

The meander of the lake along section 20 was twice run. The explanation of the second running of this line, in 1835, is probably that only a temporary post was set at the intersection of the first line with the state line between Indiana and Illinois. (Record, 70.) On running the second line, in 1835, the surveyor set a post for the fractional corner, the water being too deep to raise a mound. Evidence was taken as to the construction to be put upon the surveyor's notes in respect to the character of the land traversed by him in meandering along the northerly side of the lake; also as to the inferences to be drawn from the statement in such notes of the depth of the water. (Record, 338-9, 408, 412.)

As to these matters, Mr. Rossiter, a surveyor of much

experience, stated that he regarded the notes as true, in that the higher portions traversed along the southwest fractional quarter of section 20 might have been covered with water to the depth of six inches, (Record, 338-9), though he did not construe the notes as signifying that on the whole line the water was six inches or more deep. He said: "Almost the whole southern end of the section, as represented on the government plat, would be low ground." (Record, 307.)

Witness Samuel S. Greeley, a practical surveyor, called by Mr. Jordan (Record, 413) construed the remark in the Field Notes, "land all marsh; water from six inches to three and a half feet deep" (as stated in the Field Notes of the meander, Record, 70), as an indication of the general character of the ground that the surveyor traversed in section 20; an indication of the character of the land on the meander line and on each side as the surveyor passed along; all being marsh of varying depths of water.

Further of "Jordan's Map C."

A map preceding page 91 of the record is called "Jordan's Map C." It was introduced in evidence by Mr. Shedd. (Record, 91.) It purports to show the topography of the lake bed in contour lines for each foot in elevation. It was constructed from different surveys running from 1886 to 1890. (Record, 178-9.) It professed also to show, though we should say but theoretically, the outlines of the lakes (Wolf and Hyde) at a given stage, namely, at *datum*. (Record, 91.)

The map does not even profess to represent the water as it stood at the time of any special survey. At the time

of one of the surveys, made in August and September, 1888, and from which survey the map was in part constructed, much of the land shown was covered with water (Record, 185-6), the elevation of the water being about two feet above *datum*. (Record, 199.)

In a previous survey in 1883, in which Mr. Shields (under whose supervision map C was constructed, Record, 178), assisted, the water of the lake was 3.5 feet above *datum*. (Record, 192.)

Mr. Shedd, speaking of the map, said that the lightest colored portion south of the name "Condit" was intended, as he supposed, to represent the highest portion of the ridge, which in most ordinary stages of water is dry (Record, 72); that in extreme high water about all of the ridge would be covered with water; and that he had seen the water so high that very little of the ridge would show out of water, it not being possible to get along there except by boat, (Record, 73), but in ordinary stages of high water the whitest portion, as indicated on the map, was probably above water.

This map does not seem to have been constructed with the care usual in map making, there being much contradiction between the elevations of the area within the meander line, given in figures, and the elevations shown by contour lines. The map would be controlled by the elevations shown in figures, and the contour lines should have been drawn to correspond with them.

Mr. Shields, being examined as to the contour lines and the seeming contradictions between them and the elevations shown in figures on Map C, said, in reference to the elevation of the water of the lake at the time of an earlier survey, it being in 1883, and the water being

three and a half feet above *datum,* that the land shown on the map between Wolf and Hyde Lakes, as 2.7, 3.0, 2.1, 0.7 feet in elevation would be overflowed by water at three and one-half feet, as would all elevations below three and one-half feet. (Record, 192, 199.) He further explained (Record, 192) that the time in 1883, when he ascertained the height of the waters as being three and one-half feet, was different from the time of the survey in which he and Mr. Cole surveyed the meander line, from which other survey the map marked "Jordan's Exhibit 4½" was constructed. (Record, 173.)

Map C will be further noticed in a later part of this brief.

FURTHER AS TO ELEVATIONS OF WATER IN THE LAKE SINCE 1874.

Considerable evidence was introduced as to the elevation of the water of the lake with reference to city *datum* since (and for a short time prior to) the survey of 1874.

Mr. Rossiter said that the common name of the lake in the early years of his knowledge of the region was Wolf Lake (Record, 301); that locally the name Hyde Lake may have been applied, but this water was not so known in Chicago.

A part of a map compiled by James H. Rees, published in 1851, entered according to the Act of Congress in that year, was received in evidence with reference to reputation at the time named as to the name of the lake, to wit, Wolf Lake. (Record, 347, 349.) A copy of the map (Record, 349) is shown herein (marked map No. 5).

7493

MAP No. 5.

HARDINS EXHIBIT
HANDY No. 1.

COPIED FROM MAP ENTITLED

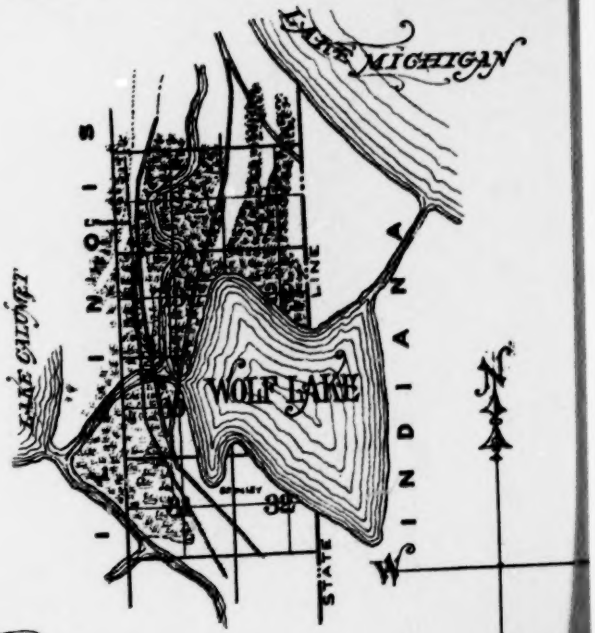
MAP OF THE COUNTIES OF COOK AND DUPAGE, THE EAST PART OF KANE & KENDALL, & THE NORTH PART OF WILL.

STATE OF ILLINOIS.

COMPILED BY
JAMES H. REES
LAND AGENT.
CHICAGO, ILL.

1851.

SCALE, 1 INCH = 100 CHAINS.



FOLLOWING NOTE APPEARS ON SAID MAP

ENTERED ACCORDING TO ACT OF CONGRESS IN THE YEAR 1851 BY JAMES H. REES IN THE CLERKS OFFICE OF THE DISTRICT OF ILLINOIS.

COPIED BY F.C. MORRITZ SURVEYOR ROOM 1 - 91 WASHINGTON ST. CHICAGO ILL.

HARDIN'S EXHIBIT

HANDY No. 2.

COPIED FROM MAP ENTITLED

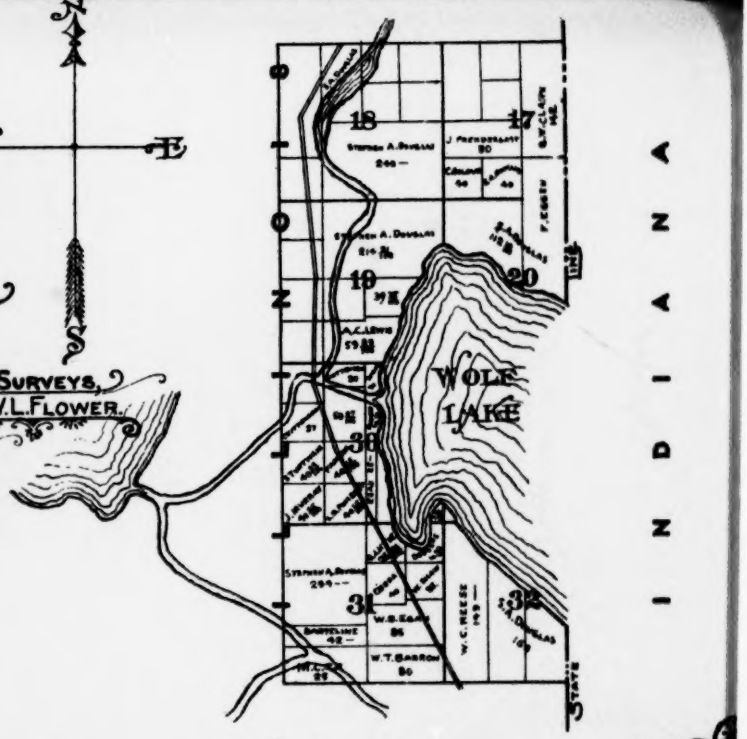
MAP OF COOK COUNTY, ILLINOIS.

COMPILED & DRAWN FROM RECORD & ACTUAL SURVEYS, BY W.L. FLOWER.

PUBLISHED BY S.H. BURHAN & J. VAN VECHTEN.

1861.

MAP No. 6.



COPIED BY E.C. ROSSITER SURVEYOR ROOM 1 — 91 WASHINGTON ST. CHICAGO, ILL.

Another map was also received by the court. It was published in 1861 by S. H. Burham and J. Van Vechten, and was compiled and drawn from record of actual surveys, by W. L. Flower. The lake is thereon designated "Wolf Lake." This map, like the Rees map, shows no areas within the lake borders. (Record, 348.) A copy of the map as shown in the record is herein shown (marked map No. 6).

Mr. Rossiter testified that he knew the lake by personal observation in 1870; that about 1875 he attempted a survey of a tract in the northeast quarter of section 19, the southeast corner of which was in the lake, but the water was so high he was unable to reach the corner to fractional sections 19 and 20, established in the survey of 1834, the water where he went being at least from one to two feet in depth. (Record, 302.) Subsequently he had made a great many surveys, perhaps forty, in and on the border of the lake. (Record, 301.) At many times he had taken the elevation of water, being employed by one Jacob Forsyth with reference to proving the facts in a lawsuit. (Record, 323.) He presented a table showing the elevations and dates. This table is shown herein. (Record, 322.)

Elm Island, said witness Rossiter, would be submerged at a stage above 4.2, that being the highest point he found on the island. (Record, 320.) He did not observe the strip between the two lakes in his early survey, not having gone to that locality. (Record, 326.) The elevations of the water taken by him for Mr. Forsyth were on the lake in Indiana, the surveys not requiring observation of other conditions. (Record, 328.)

He had seen the strip once in 1885 very nearly covered with water, the stage of water at the time being 2.35 above *datum*.

Mr. Shedd, speaking of the elevation of the water with reference to city *datum*, said he at one time marked the water line of the lake and ascertained it was 4.4 feet above *datum*. (Record, 404.) Like testimony was given by Mr. Field, the business associate of Mr. Shedd. (Record, 368.)

It was shown that in May and June, 1885, beginning the work May 25th, a survey was made of a line through the bed of the lake for the South Chicago and Southern Railroad. In such survey the elevations of the bed and of the water were taken. The surveyors used a boat, and hip rubber boots when they were sufficient. (Record, 262-3.) In one case, down about the south line of 20, the water was so deep they had to take off their clothes, drive stakes, turn the boat upside down and get on the top of the boat in using the transit to run the line. (Record, 263.) The average depth of water was about three feet, both east and west of the railroad line. (Record, 264.)

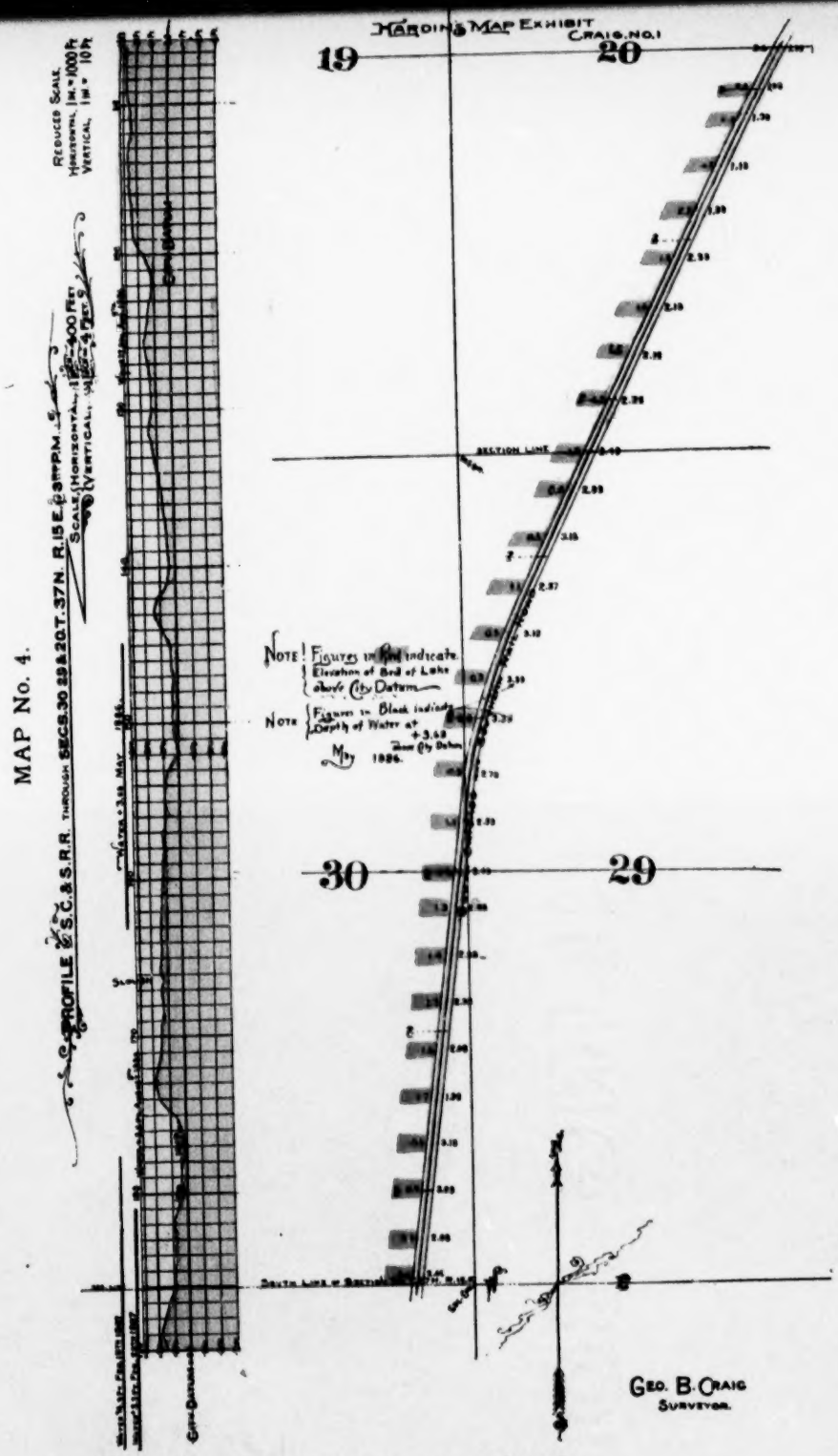
About opposite (west of) Smale's house (Condit house) the water was about four feet deep with three or

7475

ROSSITER'S ELEVATIONS OF WOLF LAKE.

MONTH.	DATE.	YEAR	FEET ABOVE CITY DATUM.	(RECORD 322.)
January	21	1875	1.33	
February	6	"	1.33	
March	23	"	1.33	
January	3	1876	2.58	
"	14	"	2.58	
"	21	"	2.66	
"	25	"	2.75	
February	9	"	3.05	
"	10	"	2.99	Opened Wolf River. Lake Michigan elevation, 1.14.
"	15	"	2.58	Wolf River open.
"	19	"	1.99	Wolf River open.
"	26	"	1.66	Lake Michigan running in.
March	10	"	1.60	
"	14	"	1.79	
April	22	"	2.87	
"	26	"	2.91	
June	16	"	3.04	
"	20	"	3.16	
"	21	"	3.16	
July	8	"	3.33	Opened Wolf River into Lake Michigan.
September	16	"	3.12	
November	11	"	2.99	
January	11	1877	2.75	
"	26	"	2.87	
February	14	"	3.16	
May	28	"	2.63	
September	5	1878	2.04	
October	9	"	2.04	
November	25	"	2.28	
December	4	"	2.23	
"	5	"	2.33	
February	26	1883	3.43	
March	2	"	3.93	
October	16	"	2.20	
April	27	1885	2.51	
July	12	"	2.35	
June	12	1888	2.21	
July	12	"	2.21	

(Average elevation—2.52.)


MAP No. 4.
C. & S. PROFILE U.S.C.&S.S.R.R. THROUGH SEC'S 30 & 29 & 20 T. 37 N. R. 15 E. 3 RD P.M.
SCALE (HORIZONTAL 1 IN. = 400 FEET
(VERTICAL 1 IN. = 4 FEET
REDUCED SCALE.
HORIZONTAL 1 IN. = 1000 FT.
VERTICAL 1 IN. = 10 FT.
MARGIN & MAP EXHIBIT
CRAIG NO. 1
19
20
30
29
SECTION LINE
NOTE: Figures in Red indicate Elevation of Bed of Lake above City Datum
NOTE: Figures in Black indicate Depth of Water at +3.68 above City Datum
May 1886.
GEO. B. CRAIG
SURVEYOR.

ELEVATION OF WATER ABOVE CITY DATUM.

May—, 1886,	3.68	(See Craig's Testimony, Rec., 264.)
August 9, 1886,	2.80	
February 15, 1887.	4.30	
February 28, 1887,	3.30	

7477

four feet of mud. (Record, 263.) The bottom was better south to Elm Island, the water being about three feet deep, on an average, when floating bog was encountered for a distance of about 300 feet, and from there south there was sand bottom, the water averaging one and a half feet deep, the water east of the line run being at about the same average height as upon the line. (Record, 263-4.) The elevation of the water was taken in May of that year, it being 3.68 feet above *datum*. The water stood August 9, 1886, at 2.80; February 15, 1887, at 4.3, and February 28, 1887, at 3.3 above *datum*.

A map was presented showing the line surveyed with relation to the sections through which it ran. Figures on the right side of the line represent the depth of water at regular points; the figures on the left side of the line represent the elevations of the lake bed with reference to city *datum*. There was also shown on the map a profile of the lake bed showing its surface and representing also the elevation of the water as it stood February 28, 1887, being 3.3 feet above *datum*. Lines indicate other elevations of the lake, as taken, to wit, May, 1886, 3.68; August 9, 1886, 2.8; February 15, 1887, 4.3; February 28, 1887, 3.3. (Rec., 267.)

A copy of this map is shown herein, marked map No. 4.

Mr. Craig, the railroad engineer who made the survey for the R. R. line, said that when the water stood at 4.3 above *datum* there was not much land uncovered with water between the two lakes, only here and there at the north part a little ridge could be seen "peeking out." (Record, 279.) The Field place did not then appear as an island, it being submerged, the houses being sur-

rounded by water and no land being in sight east of and along the railway line, except the tops of ridges, and the ridges were partly covered with water, there being breaks in which the water stood. (Record, 279.)

In July, 1886, the railroad people set dredges at work to enlarge the old outlet of the lake for a part of the way from the little Calumet to the lake, and to make a cut across Indian Ridge on the west shore of the lake in the southeast quarter of section 30, and on through the lake to the line for the railroad. One of the dredges passed northeasterly through the lake to near the east and west center line of section 20. (Record, 156-7.) Both dredges were used to dredge material from the west side of the railroad line, and in the work of making a fill for the railroad bed; and in doing this there was excavated west of the railroad a ditch about thirty-five feet wide and several feet deep. The dredge also enlarged the hunter's ditch south of Elm Island. Afterwards, in 1887, dredges were used to throw up the road bed for the Calumet River Railroad on the west side of the lake. Mr. Craig said that after the cut was made connecting the lake with the river the water varied but little, rising and falling with the river as influenced by the wind on Lake Michigan. Before the ditch was cut evaporation was reducing the water gradually. (Record, 275-6.) After the cut was made the water from the river came into and went out of the lake more freely.

Honorable Walter Q. Gresham, while presiding in the Circuit Court of the United States for the Northern District of Illinois in 1885, at the trial of *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, and, before rendering judgment therein, made a tour of inspection of the premises. (Record, 354.)

He was accompanied by Mr. Kemp, deputy clerk of the court; Mr. Burnham, the court's stenographer; John B. Hawley and John I. Bennett, attorneys for Conrad N. Jordan; William Prescott, attorney for William H. Mitchell, and Mr. I. N. Hardin.

Judge Gresham, like others of the party, was equipped with hip rubber boots, using which he crossed the lake from the Smale place to the Field place. After inspecting the spur or area west of Smale's (Condit house), an effort was made to make a crossing easterly to Smale's house, but it was abandoned. The party returned and then proceeded to inspect the Smale ridge. It was found to be from fifty to 100 feet wide between the water on each side. In some places the top of the ridge was very narrow. (Record, 355-6.) At the point or terminus of the ridge, inspection was made of the corduroy road and the space between the point and the area lying southwesterly, called in the record "Crescent Shaped Island." This island was narrow, and in some places not exceeding twenty-five feet in width, but a mere thread.

From the island Judge Gresham and Messrs. Bennett and Hardin proceeded south to Field's house, the remainder of the party returning to the conveyances and driving out east and making the passage south through the lake by carriages. From the Crescent Shaped Island to Field's the party in boots found a newly constructed road had been made through and across that part of the lake, of brush and material upon which hay had been piled, the water being under as well as upon each side of the road, the weight of the walkers causing the water to appear above the surface of the hay as they proceeded. (Record, 355-6.) From Field's the party proceeded south to Reese's point, and from there around the western shore of the lake and returned home.

In describing the character of the soil and growth south from Smale's to Reese's, the witness Hardin said it was a grassy bar of muck deposit, with a growth of swamp grass, such as is usual in low wet places. Upon the south end of the "Crescent Shaped Island" there were elm trees. Along the center, and extending farther south, they found brush and poplar trees of recent growth. On the Smale ridge were seen elms, basswood, oak and underbrush.

A map representing another survey by Cole, Alvord & Shields, to wit, a survey about September 26, 1891, for Mr. Jordan, was put in evidence as "Jordan's Exhibit D." (Record, 187.) A copy of it is herein shown as map No. 7.

It purports to represent the marginal line of the lake with the water at four inches above *datum.* (Record, 194.) The witness Shields attempted to explain the incongruity and contradiction between maps offered as Jordan's exhibits, in that, map D, while assuming to show water at four inches above *datum* represented less expanse of water than does map C, which assumed to show water at *datum.* (Record, 195-6.)

This explanation was in part that when the survey represented by the map D was begun, water was at a certain point four inches above *datum,* but that before the survey was completed, there had been a great change by evaporation, the lake spreading over much more ground at the beginning than at the close of the survey. (Record, 194-5.) The water receded from fifty to 100 feet in some places.

Witness August Neubeisser, among others, stated that Hyde Lake was divided into small ponds, the water not

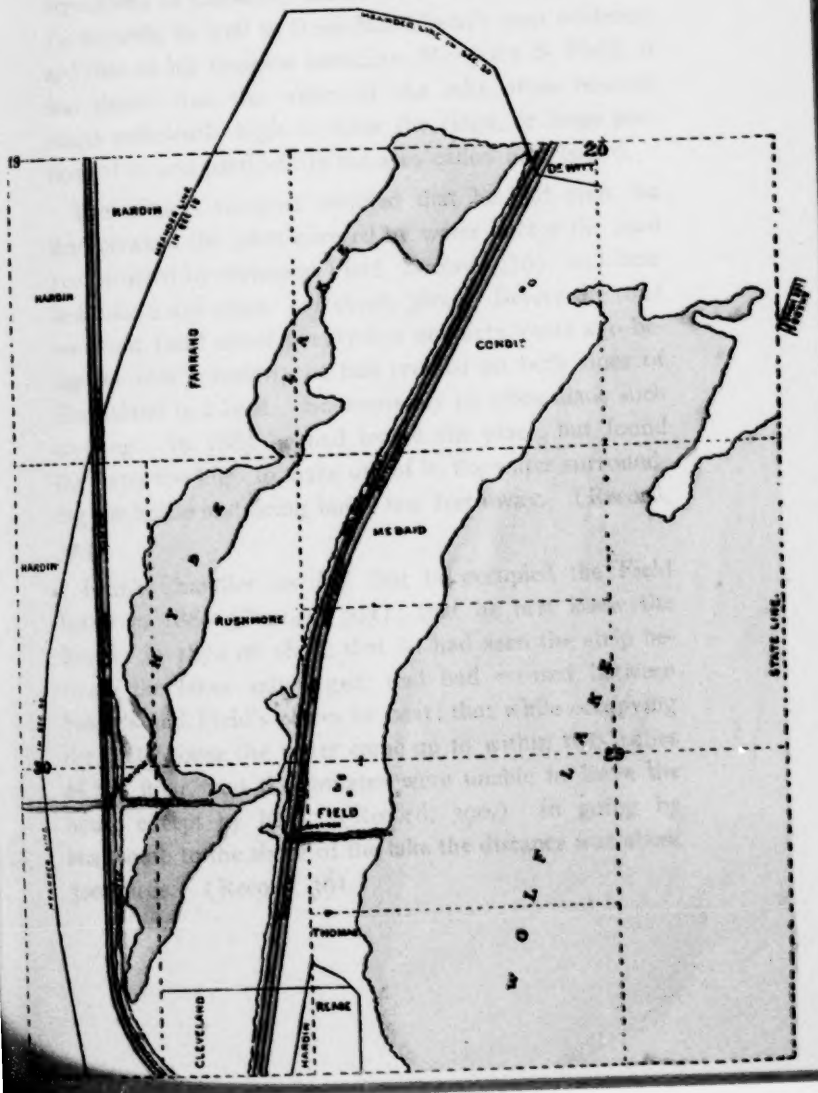
MAP No. 7.

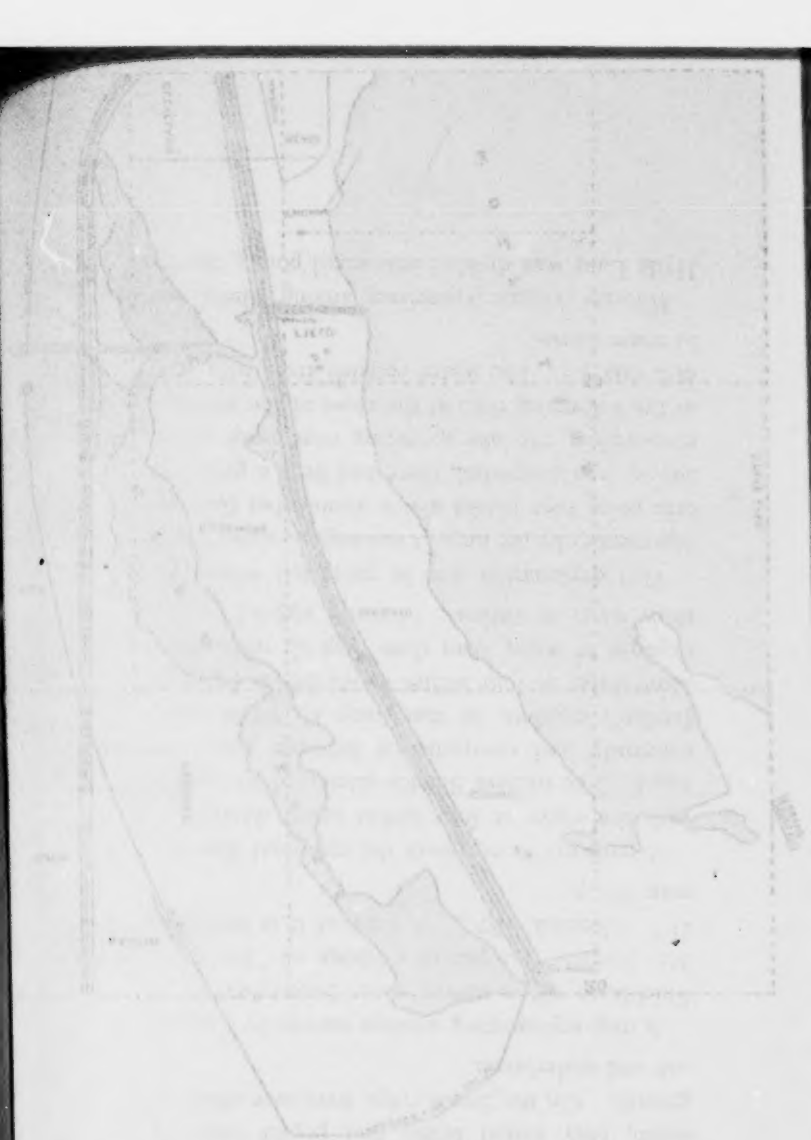
JORDAN'S EXHIBIT D.

PLAT OF PARTS OF SECS. 19, 20, 29 AND 30, T. 37, N., R. 15, EAST OF 3D P. M., SHOWING THE RELATIVE AMOUNT OF LAND AND WATER, AND THE SHORE LINE THEREOF.

DATE OF SURVEY SEPTEMBER 26, 1891.

Elevation of water in Hyde Lake is 0.373 above Lake Michigan. (Meaning *Datum*. See Shields' Test., Rec., 196.)





being of sufficient depth for the use of small boats. (Record, 344, 357.) The elevation of the water in Hyde Lake on one of the days of the trial was two inches below *datum*. (Record, 326.)

In certain depositions taken by Mr. Shedd, to wit, in depositions of Gardner, Chandler, Farnsworth and Mrs. Farnsworth, as well as from Mr. Shedd's own evidence, and that of his business associate, Mr. John S. Field, it was shown that the water of the lake often reached stages sufficiently high to cover the ridge, or large portions of it, and particularly the area called Elm Island.

The witness Gardner testified that he had seen the land between the lakes covered by water except the road (constructed by Solomon Field, Record, 376), and here and there a dry place. (Record, 380.) Before the road was built (and about twenty-five or thirty years ago being the first occasion) he had crossed on both sides of Elm Island in a boat. Subsequently he often made such crossing. In 1883 he had leased the place, but found the water too high to make use of it, the water surrounding the house and being but a few feet away. (Record, 374.)

Frank Chandler testified that he occupied the Field house in 1886 (Record, 393); that he first knew the locality in 1872 or 1873; that he had seen the strip between the lakes submerged, and had crossed between Smale's and Field's places by boat; that while occupying the Field house the water came up to within two inches of the floor, and the inmates were unable to leave the house except by boat. (Record, 390.) In going by boat south to the shore of the lake the distance was about 300 yards. (Record, 391.)

The witness Farnsworth testified that he was familiar with the strip of land between the two lakes and had seen it covered with water two or three times; that he had crossed there in a boat, and that he had also been over the strip in a wagon; that he had seen the lakes when they looked like one lake (Record, 398); that he had seen the water so near the Field house that one could step from the door into the water, or into a boat; that once he had tried to reach the house with a team, but found that he could not do so. (Record 398-9.)

Mrs. Farnsworth testified of having gone with Gardner and her sister to clean the house for Gardner in 1883; that she waded through the water, having taken off her shoes, to reach the house, and crossed the little channel on the bridge that was there. (Record, 402.)

Mrs. Minnie Langlotz was called at the hearing, as was also Mrs. Annie Neubeisser, by Mr. Shedd. The former testified that she had often seen the water extending over the strip between the two lakes, they being one lake; that the walk (road) from south to north across the cut (channel) was so far covered with water as to be impassable for walking. (Record, 361.)

Mrs. Neubeisser testified that for many years prior to 1874 she had lived with her father, Joseph Konyvesy, on the west side of Hyde Lake, on what is now known as the Rand and Steele property, it being west of the tract claimed by Konyvesy as pre-emptor under survey of 1874; that she now lives south of the cut south of Field's place; that she had seen the water extend over the low ground on both sides of the cut, south of Field's, many times, the water being almost always over a part of it; that she had seen the lakes when they looked like one

lake, and had crossed in a boat many times between the lakes. (Record, 357-60.)

August Neubeisser, a tenant of Mr. Shedd, living on section 29 south of Elm Island, gave like testimony to that of his wife. He had crossed in a boat south of the cut south of Field's, and had made such crossing also north of Field's. (Record, 343-7.)

A stipulation was filed July 8, 1892, that the judgments rendered by the Circuit Court of the United States for the Northern District of Illinois in *Mitchell* v. *Smale* and *Hardin* v. *Jordan* (ejectment cases), had, upon the application of the defendant in each case, been vacated and set aside under the provisions of the statutes of Illinois. (Record, 415.)

Said stipulation was filed after the hearing and while the case was under advisement in the Circuit Court of Cook County.

(*c.*) THE DECREE OF THE CIRCUIT COURT OF COOK COUNTY AUGUST 10, 1892, SUBSEQUENTLY REVERSED IN PART.

The Circuit Court of Cook County, by decree rendered August 10, 1892 (Record, 416), recited the consolidation of the two burnt records cases (*Shedd* v. *Thomas et al.*, 442 B. R., and *Shedd* v. *Fuller et al.*, 443 B. R.), and the hearing of the same on pleadings and evidence, oral, documentary and written.

The decree found, *inter alia*, the issuing of the patent October 1, 1855, to Stephen A. Douglas for "Fractional Section 29," aforesaid. That the right, title and interest acquired by said Douglas through the patent had been acquired by petitioner Shedd. That the public rec-

ords had been destroyed by fire on or about October 9, 1871, That patent from United States to Horatio B. DeWitt for southwest fractional quarter of fractional section 20 was issued March 1, 1850. That said Shedd, at the commencement of this proceeding, had acquired title to the premises through said patent.

That Gertrude H. Hardin became seized in fee simple of the premises for which the certificate of entry was issued to said John Holbrook December 24, 1838, upon which the patent was issued to said Holbrook May 20, 1841, the premises being described in the patent as the southeast fractional quarter and the east fraction of the southwest fractional quarter of section 19, and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30, in township 37 north, range 15 east, in the district of lands subject to sale at Chicago, Illinois, according to the official plat of the survey of said lands returned to the General Land Office by the surveyor general.

That the survey represented by said plat was made in the years 1834 and 1835. That according to said plat the southeast fractional quarter of section 19 and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30 were situated on the borders of the lake designated on the plat "Navigable Lake," but which then was and is in fact a non-navigable lake. That said lake was meandered for the purpose of ascertaining the quantity of upland to be charged for, and not for the purpose of limiting the title of the patentees to the meander line, the lake or waters thereof constituting the boundary.

That said Gertrude H. Hardin traced title from William B. Egan under the patent issued to him August 1,

1853, for one of the tracts bounded by said lake in said plat, to wit, to that part of the west fraction of the south-east quarter of section 30 which was bounded on the west by a line running north and south at a distance of eighty rods east of and parallel with a line running north and south through the center of said section 30.

That prior to the survey by the United States the proprietary right to the lands in question and to the lake bed, and also to the lake itself, was in the United States. That after such survey the lands in said township were regularly brought into the market and disposed of in pursuance of the Acts of Congress in such case made and provided, according to the official plat of such survey, without any reservation on the part of the United States in respect to the lake bed, or any part of the same, and that said lake bed passed to the patentees or grantees from the United States, who thereupon became and were seized of all the proprietary rights to the extent of their interest in the said lands of the United States in respect to the lake or lake bed.

That the attempted survey of the lake bed in 1874 was unauthorized, and that the attempted conveyances thereof by patents based upon such survey were without authority of law and illegal and void. That such survey of 1874 was based upon the correctness of the survey of 1834-5, but was ordered on the theory that the meander line was a line of boundary, and that parts of the lake had become by the recession of the waters dry land and subject to cultivation, and that the United States owned the same. But the court found that the meander was not a line of boundary, and that the survey of 1874 was unauthorized.

That the patentees from the United States under the survey of 1834-5 of the lands bounded by the lake took to the center of the lake, ratably.

That both the patents to said Douglas and said DeWitt under which petitioner Shedd claimed, as well as the patents under which Gertrude H. Hardin claimed, were based upon a survey made by the United States in 1834 and 1835, and referred to a plat made from said survey which, with the Field Notes of the survey, showed the lake as a boundary.

That said lake in fact, and as shown by the plat, extended easterly beyond the state line between Indiana and Illinois into Indiana, and that a north and south line dividing it in the center would lie just east of the state line, which latter line was a little less than one mile east of the north and south section lines between sections 30 and 19, and sections 29 and 20.

That at the time of the government survey of 1834 and 1835 the point of land shown on the plat as the southwest fractional quarter of fractional section 20 extended in a southwesterly direction to the south line of said section.

That the ridge or point of land forming the northerly portion of fractional section 29 extended north and northeasterly to the north line of the southwest quarter of said section. That the east fraction of the southeast quarter of section 30 formed a part of this ridge, and extended to the north line of the south half of the southwest quarter of section 29.

That north of the north line of the south half of said section 29, up to the south line of said section 20, the land was at the time of the government survey of 1834 and 1835 covered by the water of the lake so that at that time there was there but one lake extending, as shown on the official plat, from the west line of the lake to the state line.

That the survey of 1874 was obtained upon affidavits untruly alleging that the bed of the lake was land fit for cultivation.

The decree proceeded (Record, 419) to pass upon the various claims setting up tax titles, and held the tax titles to be invalid, conditioning to some extent the decree of invalidity upon payment of taxes and legal costs.

The court (Record, 421) decreed that the petitioner Charles B. Shedd should recover all the land, whether submerged or not, in the said southwest fractional quarter of said fractional section 20, and the southeast fractional quarter of fractional section 19, in township 37 north, range 15 east of the third principal meridian, in Cook County, Illinois, which lies to the easterly of the middle line of the body of water commonly known as Hyde Lake, lying in part of said quarter sections and having been originally a bay of Wolf Lake, said line to be run, taking as a guide, so far as practicable, the meander line, as shown by the government survey of 1834 and 1835, and treating the same as a shore line by measurement from which said middle line is to be ascertained.

The title of said Shedd was by decree established, and he was adjudged to be seized thereof as of an indefeasible estate of inheritance, in fee simple, as well against all the parties to the cause as against all persons claiming or to claim under them, or either of them, or any of them, as against all the world.

It was further adjudged and decreed that said Shedd should have and recover all the land, whether submerged or not, in the south half of said fractional section 29, in township 37 north, of range 15 east of the third principal

meridian, in Cook County, Illinois, the north and south boundary lines of said tract being extended to the state line between Illinois and Indiana, and also all of the land, whether submerged or not, which would be included between the west line of the northwest quarter of the southwest quarter of said section 29, an east and west line run from the southwest corner of said quarter-quarter to the middle line of the bay to the west of said tract, the middle line of said bay, and another east and west line from the northwest corner of said quarter section to the middle line of said bay, being so much land, whether under water or not, as lies directly west of said northwest quarter of the southwest quarter of said section 29 and between that tract and the middle line of said bay, the meander line of the government survey of 1834 and 1835 to be used as a guide in establishing this middle line; and the title of said Shedd was established as aforesaid.

The court decreed that said Gertrude H. Hardin should have and recover the east fraction of the southwest fractional quarter and the southeast fractional quarter of section 19, aforesaid, and the northeast fractional quarter and the east fraction of the southeast fractional quarter of section 30, except the right of way through said southeast quarter of section 19 and northeast quarter of section 30, granted by said Gertrude H. Hardin and Isaac N. Hardin, her husband, to the South Chicago and Southern Railroad Company, by deed bearing date December 24, 1886, and recorded in the recorder's office of said county January 19, 1887, and also except a strip of land 400 feet wide to be taken from the south side of said section 19, according to a certain deed from said Gertrude H. Hardin and Isaac N. Hardin to the Cook County Canal and Dock Company, bearing date August

30, 1884, and except also so much of said southeast fractional quarter of section 19 as lies to the east of said middle line of Hyde Lake; and in fixing the extension into the lake of the tracts so owned by said Gertrude H. Hardin it was further considered, ordered, adjudged and decreed by the court that the said Gertrude H. Hardin should have, hold and recover, with the exception of said right of way and the said strip of 400 feet, all the land, whether submerged or not, which lies to the westerly of the middle line of the said bay of Wolf Lake between the southwest fractional quarter of section 20, and the southeast fractional quarter of section 19, such middle line to be surveyed or determined in the manner above stated, with reference to determining the westerly boundary of the southwest fractional quarter of section 20 as awarded to the petitioner Shedd as aforesaid. And the title of the Cook County Canal and Dock Company to said strip of 400 feet, as described in said deed to said company, was confirmed as a title in fee simple, said strip of 400 feet, however, being held to extend eastward only to the middle of the bay lying eastward of said southeast quarter of section 19, the easterly half of said bay being allotted to said Shedd by a line to be run to divide the same, as before provided in the decree.

Also the decree declared that said Gertrude H. Hardin should have and recover the northeast fractional quarter of section 30, in the township and range aforesaid, and that the same be held to embrace and include all the land, whether submerged or not, extending eastward from said congressional subdivision to the state line of Indiana, the lines of said quarter section originally bounding it on the north and south, respectively, being extended as the north and south boundary lines, respectively, of said tract to said state line.

Also, that the said Gertrude H. Hardin should have and recover all the lands, whether submerged or not, in the northeast quarter of the southeast quarter of section 30 aforesaid, lying west of the westerly line of the land awarded as aforesaid to said Shedd, as a part of the northwest quarter of the southwest quarter of section 29 aforesaid, and that said Gertrude H. Hardin should have and recover the southeast quarter of the southeast quarter of said section 30.

Also that the petitioner Shedd and cross-petitioner Gertrude H. Hardin should take and hold title to land under water awarded to them, respectively, subject to the right, if any, of shore owners upon said lakes to use in common the waters of said lake for purposes of fishing and boating, and similar usual and customary use, but that the right to cut ice in said lakes might be exercised only by owners of the bed of the lake over which such ice was formed; and no reservation was made in any manner to impair that right.

The several cross-petitions of John I. Bennett, Andrew Crawford, Elizabeth P. Thomas, Conrad N. Jordan, J. Ensign Fuller, Franklin A. Cleaveland, Frank I. Bennett, James W. Converse and Charles E. Rand were dismissed for want of equity.

Appeal was prayed and taken by Conrad N. Jordan, J. Ensign Fuller, John I. Bennett and Frank I. Bennett to the Supreme Court of Illinois. Also by consent the appeals were to be to the Supreme Court sitting in what was then the Central Grand Division of Illinois. (Record, 424.) Appeals to said Supreme Court were also prosecuted by Elizabeth P. Thomas, The South Chicago and Southern Railroad Company, Charles E. Rand and Franklin A. Cleaveland.

In the assignment of errors by Fuller, Jordan and others, it was alleged that the Circuit Court erred in finding that there was no reservation by the United States in respect to the lake bed. Also in finding that such lake bed passed to the patentees under the survey of 1834-5. Also in finding that the United States could not restrict the rights of such patentees after selling the lands according to said survey or the plat representing the same. Also that the court erred in holding that the survey of 1874 was void. Also that the court erred in decreeing that the patentees from the United States under the survey of 1834 and 1835 of lands bounded by the lake took to the center of the lake. Also the court erred in holding that the meander line was not a line of boundary. (Record, 425-6.)

(*d.*) Judgment was rendered by the Supreme Court of Illinois January 17, 1896, affirming the aforesaid decree in part and reversing the same in part, and remanding the cause to the Circuit Court for further proceedings as should to justice and law appertain. (Record, 426-7.)

(*e.*) The case having been thus remanded to the Circuit Court of Cook County, it was redocketed therein June 25, 1896, in pursuance of the remanding order. (Record, 429-30.)

When the cause further came on to be heard in the Circuit Court of Cook County, to wit, on the 16th of March, 1897, said Gertrude H. Hardin, by her counsel, suggested to the court that she wished to present further evidence upon the question left open for consideration by the decision of the Supreme Court of Illinois, and was prepared to show that since the entry of the original de-

cree from which appeal had been taken another trial of the ejectment suit of *Gertrude H. Hardin* v. *Conrad N. Jordan,* in the Circuit Court of the United States for the Northern District of Illinois, referred to in the pleadings herein, had occurred, and resulted in judgment as per transcript.

That she expected to show by testimony that said Shedd had, since the decision of the Supreme Court of Illinois, taken possession of part of the lands recovered by her by the judgment aforesaid in the Circuit Court of the United States.

That in determining the rights of the parties to accretions or relictions further testimony would be necessary with reference to artificial conditions for which said Shedd was responsible, and which tended to her injury upon the question, what was the extent of the land submerged? And she expected to show by such testimony that her tracts on the west shore of the lake represented in the plats were under the decision of the Supreme Court of Illinois to be bounded by the remaining part of the lake represented by said plat, there having been such recession of the waters from the west shore that her lands extended to the somewhat permanent waters near the line between the States of Indiana and Illinois.

That the testimony taken at the former hearing, prior to the entry of the decree, had not been directed especially to the question of extent of accretions or relictions, but had more especially pertained to the question raised by persons claiming under the survey of 1874, whether there were omitted lands, or lands which should be construed as having belonged to the United States after the issuing of the patents under the survey of 1834-5.

It was further suggested in the motion that injustice would be done said Gertrude H. Hardin if the conditions of the property at the time of the rendering of the former decree, or at the time of the filing of the petition by said Shedd, were alone to be considered upon the evidence taken before the rendering of said decree. With this motion was submitted a transcript of the said judgment in the Circuit Court of the United States, in *Hardin* v. *Jordan,* which judgment was rendered December 10, 1896. (Record, 433-4.)

In such judgment it was found that said Gertrude H. Hardin was entitled to recover possession of the premises described in the declaration, and was seized thereof in fee simple. That the original defendants (for whom as landlord Conrad N. Jordan was substituted) were, at the time of the commencement of the suit, in possession of the premises, or parts thereof, claiming an interest under a survey made in 1874, which the court held to have been unauthorized, and the premises so held adversely to the plaintiff were described as follows:

Lots 2 and 3 in the southeast quarter of section 19, lot 2 in the southwest quarter of section 20, the southeast quarter of the southwest quarter of section 20, the west half of the southwest quarter of section 20, lot 1 in the southeast quarter of section 20, lots 1 and 2 in the northeast quarter of section 29, the northwest quarter of section 29, the north half of the southwest quarter of section 29, the east half of the northeast quarter of section 30, lot 1 in the northeast quarter of section 30, the northeast quarter of the southeast quarter of section 30, lot 3 in the southeast quarter of section 30, all in township 37 north, range 15 east of the third principal meridian.

And the court found that the southeast fractional quarter of section 19, and the northeast fractional quarter of section 30 and the east fraction of the southeast fractional quarter of section 30, in the township and range aforesaid, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor General, were bounded by or situated on a lake which was and is non-navigable, the principal part of which is now known as Wolf Lake, and that the said plaintiff, as owner in fee of said several tracts, had and has the rights of a riparian proprietor in respect to said lake, as represented on said plat, and that the seisin of the said plaintiff as to the two first named tracts last aforesaid extends to the center of Wolf Lake, the north and south lines of said tracts, respectively, being extended or carried to such center, excepting from the bounds thus inclosed, the fractional southwest quarter of fractional section 20, and also the southeast fractional quarter of said section 20, in said township and range, according to said official plat, and excepting also an extension of said last two mentioned tracts, respectively, westward to the center of the bay or part of said lake immediately west of each of said tracts, respectively, such extension of the second of said tracts having for its south boundary a line drawn westward from a point on the state line between the States of Indiana and Illinois, twenty-two chains and sixty-nine links south of the east and west center line of said section 20, according to said plat, and that the east fraction of the southeast fractional quarter of said section 30 extends to the middle of the bay or projection of the lake in front thereof.

It was also adjudged that the said Gertrude H. Hardin, plaintiff, should have a writ of possession for

the said tracts of land of which she was so seized, so extending into and to the center of said lake and bays, respectively, except as aforesaid, and thereby take, as to said several tracts so owned by her, the full rights of a riparian proprietor.

The certificate of evidence further states, among other things, that said Gertrude H. Hardin produced witnesses to show the extent of the accretions connected with and properly a part of the tracts of said Gertrude H. Hardin and the Cook County Canal and Dock Company, and the nature and extent of the recession of the waters of the lake, and to show that but a small part of the lake, to wit, a part near the line between Indiana and Illinois, and a part east of said line, remained a lake, the residue being accretions, and that so far as it was in Illinois it had but little depth or likelihood of permanence unless artificially sustained or protected, and had for some years been kept at an artificial elevation by the original petitioner Shedd, in order that ice might be taken therefrom at seasons for gathering ice, and that but for such artificial elevations the accretions, properly a part of the tracts belonging to Gertrude H. Hardin, would be increased in area, the extent of which increase would be approximately shown by the testimony ready to be offered and produced on the part of Gertrude H. Hardin.

That the court declined to receive such evidence or allow witnesses to be examined, as produced by the said Gertrude H. Hardin, and decided to take the case upon the evidence which was considered by the court in rendering the aforesaid decree of August 10, 1892. (Record, 435.)

DECREE IN CIRCUIT COURT OF COOK COUNTY, AUGUST 11, 1897.

(*f.*) In the decree rendered by the Circuit Court of Cook County, August 11, 1897, it was recited that the case was heard upon the proofs, oral, documentary and written, taken and heard originally in said case, that is to say, before the appeal of the same to the Supreme Court of Illinois. (Record, 437.)

There was a finding of title in petitioner Shedd under the patent of Stephen A. Douglas for fractional section 29 and the patent to Horatio B. DeWitt for the southwest fractional quarter of fractional section 20, and in Gertrude H. Hardin for the lands for which the patent was issued to John Holbrook, and for so much of the land for which the patent was issued to William B. Egan as lies east of the west half of southeast quarter of said section when of the full dimensions of eighty acres. That the survey of the aforesaid lands, according to the official plat of which the patents to said Douglas, DeWitt, Holbrook and Egan were issued, was made by authority of the United States in 1834 and 1835, and that all the tracts described in said patents, except the east fraction of southwest quarter of section 19, bordered and abutted upon certain lake or lakes designated on said official plat "Navigable Lake," but which was and is in fact a non-navigable lake or lakes. That the waters of the lake constituted and were the boundaries of such grants, but that the parties holding under such patents were riparian proprietors with reference to the waters and bed of said lake or lakes, and were entitled to claim and have all and singular the rights, privileges and interest incident and belonging thereto as such riparian proprietors.

That at the time of the survey of 1834 and 1835 and at the time the said tracts of land were respectively sold and patented by the United States, the submerged land of said lake or lakes, together with the waters thereof, to the extent that the same lay within the State of Illinois, was held and controlled by the State of Illinois, who alike had the benefit thereof in fishing, boating and the like, and that so long as such meandered lakes exist, the state exercised such control and held the same so in trust. But that the riparian owners were entitled to the rights incident to riparian proprietorship, including the right to accretions and relictions, and to follow the recession of waters to their edge.

That the aforesaid survey of 1874 of the bed of said lake or lakes was ordered and made upon the theory of the correctness of the survey of 1834 and 1835, and upon the false theory or supposition that the meander line of said survey of 1834 and 1835 was a line of boundary, and that parts of the lake had by recession of the waters become dry land and fit for cultivation, and that the title to the same was vested in the United States, and that the United States possessed right and power to sell and convey the same.

The patents issued under said survey of 1874 to Andrew Farrand, Alice Condit, Thomas C. Wilkerson, John White, Solomon Field, John E. Curtis, James W. Smith, Franklin A. Cleaveland, Chester B. Rushmore, were in conflict with the rights of persons claiming under the patents issued under the survey of 1834 and 1835. That said survey of 1874 was unauthorized and void, and that the various claims set up under the survey of 1874 and adverse to the rights of the patentees under the survey of 1834 and 1835 were invalid, illegal and void, and that

the defense under the Statute of Limitations was not sustained.

That the lake, as shown by the official plat of the survey of 1834 and 1835, and, as a matter of fact, extended easterly along the state line between Indiana and Illinois, and into the former state; that it was as shown by the said plat, and that the center would lie just east of the state line, which latter line is a little less than one mile east of the north and south section line on the east side of sections 30 and 19. (Record, 447.)

That from the northeast corner of the southwest quarter of said fractional section 20 there extended in a southerly direction a ridge. From the southeast corner of fractional southeast quarter of section 30 and the southwest corner of fractional section 29 a ridge extending in a northerly direction.

The extent to which this ridge projected from the north was about 220 rods, and the extent of the projection from the south was about 160 rods.

The width of these ridges varied, some places being twenty-eight rods wide and others wider, which was dry land at ordinary stages of water, still others narrower, and this was the case at the time of the original survey. Along these ridges, in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points at their extremities were about eighty or ninety rods apart, and between these points and along the sides of the ridge and around the margin of the lake within its meandered line reeds and coarse grass grew in the water.

In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one or two acres and on which trees and bushes grew, which islands passed under said patent of fractional section 29 to the grantee therein and have vested in petitioner Shedd.

That this was substantially the physical condition in ordinary stages of water at the time of the survey of 1834 and 1835, and the changes in the physical conditions thereof from that time to the year 1874 were not great—such as existed resulting from the slow filling of the lake bed and from other natural causes.

That since the year 1874, by reason of the improvement of the Calumet River and the wearing out of deeper natural channels from the lake, and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake, there has been a recession of the waters, causing dry land on both sides of the ridge; and around the borders of the lake the recession was such that between the meandered lines and the water there was uncovered (and the greater part of the year was dry land around the lake) a strip twenty or twenty-five rods wide, and the marshy depression between the two ridges of land above described has become permanent dry land, the width thereof at the date of the former decree varying from at least thirty-six rods to seventy rods; that said permanent land thus acquired became attached to the said ridges of land as accretions and by reason of such recession of the waters.

The court adjudged that said Charles B. Shedd should have and recover the possession of the said fractional southwest quarter of fractional section 20, and the said

fractional section 29, all in township 37 north of range 15 east of the third principal meridian, and the lands particularly described as follows, to wit:

Beginning at the northeast corner of said fractional southwest quarter of said fractional section 20, township 37 north, range 15 east of the third principal meridian, running thence south along the east line of said southwest fractional quarter of said fractional section 20 (and the extension thereof to the south) to the open waters of Wolf Lake; thence along with the open waters of Wolf Lake in a southerly or southwesterly direction to the south line (extended to the east) of the said fractional section 29; thence west along said line as extended and said south line of said section 29 to the north and south section line between sections 29 and 30 of said township and range; thence north along the line between said sections 29 and 30 and its extension to the north to a point identical with the northwest corner of the southwest quarter of said section 29, if said section were fully squared out and all its lines extended; thence from said point northwesterly to the waters of Hyde Lake, along a line drawn at an angle of forty degrees with a line drawn due east and west through or at said point; thence along with the waters of Hyde Lake in a northerly or northeasterly direction to the center east and west line (extended to the west) of section 20; thence east along said line as extended and along said line to the place of beginning.

Together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or tracts of land with reference to the lakes as aforesaid, and the title of the petitioner Charles B. Shedd to said described tract, tracts

and parcels of land is hereby established and declared and confirmed, and he is hereby adjudged and decreed by the court to be seized thereof as of an indefeasible estate of inheritance in fee simple, as well against all the parties hereto, and all persons claiming or to claim under them, or either or any of them, as against all the world. And it is further ordered, adjudged and decreed by the court that all the defendants to the petition and amended petitions of the said Charles B. Shedd and all parties in possession of said lands or any part thereof so awarded to him as aforesaid, do forthwith surrender possession thereof to him, said Charles B. Shedd.

Also that said Gertrude H. Hardin should have and recover the possession of the said east fraction of the southwest fractional quarter of said fractional section 19, in township 37 north of range 15 east of the third principal meridian, together with all and singular the riparian rights and privileges and benefits incident to the position and location of said described tract or parcel of land with reference to the Calumet River as aforesaid.

Also that said Gertrude H. Hardin should have and recover the possession of the said southeast fractional quarter of section 19, township 37 north of range 15 east of the third principal meridian, and also the northeast fractional quarter and the east fraction of the south east fractional quarter of section 30, and that part of the west fraction of the southeast fractional quarter of section 30 which lies east of a line running north and south at a distance of eighty rods from the north and south center line of said section, all in the township and range aforesaid. The said tracts known as the southeast fractional quarter of section 19 and the northeast fractional quarter of section 30 are hereby held to embrace and in-

clude all the land on the west side of the open waters of Hyde Lake south of a line extended due east from the center of section 19 to the open waters of said lake, and north of a line drawn due east from the center of said section 30 to the open waters of said lake, said tracts extending to the open waters of said lake, excepting from the property herein described, a strip of land 400 feet wide, in the southeast quarter of section 19 hereinafter awarded to the Cook County Canal and Dock Company.

And the said Gertrude H. Hardin, as owner of the tracts and lands so found to be held by her, should have all and singular the riparian rights and privileges and benefits incident to the position and location of said several tracts or parcels of land with reference to said lake.

The tract known as the east fraction of the southeast fractional quarter of section 30, with that part of the west fraction of the southeast quarter of section 30, which lies east of a line drawn north and south at a distance of eighty rods east from the north and south center line of said section 30, is hereby held to embrace and include land bounded as follows:

Beginning at the southeast corner of said section 30; thence running north to the north-west corner of the south-west quarter of section 29 aforesaid, if squared out; thence northwest at an angle of forty degrees along a line fixed herein (as a boundary for property of Charles B. Shedd as described herein) to the open waters of said Hyde Lake; thence along said open waters following the same towards or to the north line of the southeast quarter of said Section 30, if fully squared out, and extending along said waters or in a direct line from said open waters to said line (if such extension be necessary to

complete boundaries), to the north line of the southeast quarter of Section 30 aforesaid, if fully squared out, and thence extending upon and along said line to a line running north and south at a distance of eighty rods east from the north and south center line of said Section 30 to the south line of said Section 30 if extended; thence east on said line to the place of beginning; so as to embrace the land southwest of said line so run at an angle of 40 degrees, and all of said southeast quarter of said Section 30, if squared out, east of said line running north and south eighty rods east from the north and south center line of said section.

Also that the said Gertrude H. Hardin, as owner of the tract and lands so found to be held by her, should have all and singular the riparian rights and privileges and benefits incident to the position and location of said several tracts or parcels of land with reference to said lake.

It was also adjudged that the Cook County Canal and Dock Company should have and recover a strip of land 400 feet wide, to be taken off of the south side of the southeast quarter of said fractional section 19, running the whole length east and west of said quarter section, and extending eastward to the waters of Hyde Lake (excepting, however, the right of way of the Calumet River Railway Company), together with all the riparian rights, privileges and benefits incident to the position and location of said tract or parcel of land, with reference to the lake aforesaid, subject to the exception aforesaid.

Exception in respect to lands awarded Gertrude H. Hardin and the Cook County Canal and Dock Company was made of a right of way in the Calumet River Rail-

way Company under a certain conveyance to the South Chicago and Southern Railroad Company.

Appeal from the decree last aforesaid to the Supreme Court of Illinois was taken by Gertrude H. Hardin and the Cook County Canal and Dock Company. (Record, 453.)

It was assigned as error that the Circuit Court erred in refusing to hear and receive further testimony.

Also in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title.

Also that said court erred in the division or apportionment of land or accretions.

Also that the court erred in awarding to said Shedd an undue quantity or proportion of such lands or accretions.

Also that said court erred in not following or observing the riparian rights of said appellants, respectively, in respect to the present or existing Wolf Lake, and in refusing to allow them, respectively , any frontage thereon.

Also that said court erred in not awarding or apportioning to the appellants, respectively, a due or proper quantity of their proportions of the lands or accretions.

Also that the basis or principle on which the decree proceeded in declaring divisional lines was contrary to the law and the equity of the case.

Also that the decree was uncertain as to boundaries given and otherwise unjust.

(*g.*) Judgment was rendered by the Supreme Court of Illinois December 6, 1898, affirming the aforesaid decree of the Circuit Court of Cook County, Illinois, rendered August 11, 1897.

(*h.*) A stipulation was made between counsel as to the making up of the record for this court.

The stipulation provided, among other things, that the opinions of Judge Tuley, written and oral, at the first hearing of the Circuit Court of Cook County, Illinois, and the opinion of said judge written or made up and sent to the Supreme Court at the second hearing, and the opinion of Judge Seaman on the hearing of an application for the stay or control to some extent of the writ of possession in *Hardin* v. *Jordan,* in the Circuit Court of the United States, should be made an appendix to the brief of counsel for plaintiff in error in this court. (Record, 458.)

SPECIFICATION OF ERRORS RELIED UPON HERE.

1. That the Supreme Court of Illinois erred in denying and refusing to give effect to the right, title and privilege, respectively, set up and claimed by the plaintiffs in error, severally and respectively, through or under the entries at the United States Land Office by John Holbrook and William B. Egan, respectively, and through or under the patents from the United States to the said Holbrook and Egan, respectively.

2. That the court unduly limited, restricted and abridged such right, title and privilege so set up or claimed when the entries and patents were respectively of land on or covering in part a non-navigable lake.

3. That the judgment ought to have been for the plaintiffs in error, respectively, that they were, as claimed by them, owners of the submerged lands to the center of the lake.

4. That the court erred in holding that said plaintiffs in error, respectively, were owners only to the water's edge.

5. That the court erred in holding that the meandering by the surveyor or deputy surveyor of the lake gave the State of Illinois rights and control in the premises to the impairment of the rights of appellants as owners of the submerged portions of their lands.

6. That the court erred in fixing the time for determining the limits or boundaries of the lands, not regarding the situation or condition thereof as represented by the official plat of the survey of the same returned to the General Land Office, but adjudging that the limits or boundaries in the matter of the several tracts would be according as accretions (so-called) had formed at an arbitrary date.

7. That the court erred in awarding an undue portion of the former submerged lands to the said Charles B. Shedd, and an inadequate portion to the plaintiffs in error, respectively, contrary to the claim made by the said plaintiffs in error, respectively, under the laws of the United States.

8. That the court erred in not following the decision of this court as to the construction and effect in respect to the lake bed of the patent titles from the United States set up and claimed by the plaintiffs in error.

9. There was error in the affirmance by the Supreme Court of Illinois of the decree of the Circuit Court of

Cook County of August 11, 1897, in that said Circuit Court in rendering said decree had refused to receive further evidence of the final judgment which before that time, to wit: on the 10th day of December, 1896, had been rendered in favor of *Gertrude H. Hardin* v. *Conrad N. Jordan,* in the Circuit Court of the United States for the Northern District of Illinois, whereby it was adjudged that said Gertrude H. Hardin was entitled to recover, and did recover, the lands which had been patented to the said John Holbrook, and which lands said judgment further found extended, as to a part thereof, to the center of Wolf Lake, and as to one tract thereof extended to the middle of the bay or projection of the lake in front of the same (Record, 432); and that the said Circuit Court of Cook County had, to the prejudice of the present plaintiffs in error, confined the case to the testimony taken at the first or former hearing, and had declined to receive or hear further testimony as to the actual extent of accretions or relictions, or "the extent of the land submerged." (Record, 432.)

(The thirty-fifth rule of this court is not supposed to be applicable to this case of error to the Supreme Court of a state, but only to cases of appeal or writs of error in cases taken from the District Court or Circuit Court direct to this court, under Section 5 of an Act entitled "An Act to establish Circuit Courts of Appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; hence the addition of Assignment 9 to the enumeration of errors as presented at pages 8 and 9 of the Record; this assignment being intended to take the place of the one so printed which was sent to this court by the clerk of the Supreme Court of Illinois with the transcript of the record.)

BRIEF.

THIS COURT HAS JURISDICTION TO REVIEW THE DECREE OR JUDGMENT OF THE STATE COURT. (REV. STAT. U. S., § 709.)

The case in the State Court did not reach the stage at which a writ of error could be sued out under said section until a final judgment was rendered by the Supreme Court of Illinois, affirming a decree denying the claim set up as existing under the laws of the United States.

The judgment of the Supreme Court of the state in the first instance, being one of reversal in part, but remanding the case for further proceedings, was not a final judgment subject to be reviewed here. *McComb* v. *Co. Coms. of Knox Co.*, 91 U. S. (1 Otto), 1.

Until the final decision of the Supreme Court of the state the decree did not become reviewable here. *Fisher* v. *Perkins* (*or Carrico, Admr.*), 122 U. S., 522; (30 Law. Ed., 1192).

Claim of proprietorship in fee simple in the lake bed under the patents from the United States was distinctly made in and by the pleadings in the Circuit Court of Cook County, Illinois. (Record, 30-1, 42-45, 48.) Such claim was predicated upon the fact that the proprietary right to the lands in question, and to the lake bed, and as to the lake itself, was in the first instance in the United States.

It was averred in support of this claim, that when the survey of the public lands was extended over the fractional township in which the lake was situated, and the

lands were regularly brought into market in pursuance of the Acts of Congress in such case provided, and when those bordering upon the body of water represented on the plat of the survey as a "lake" were sold and granted by the United States according to such plat, without any reservation on the part of the United States in respect to the lake bed, or any part of the same, such lake bed passed to the patentees or grantees from the United States. It was further claimed that thereupon the patentees or grantees from the United States, and their assigns, became and were seized of all the proprietary right in respect to the lake and lake bed which had previously been in the United States, and were so seized of the same in fee simple.

This claim was recognized in the decree originally rendered in the Circuit Court of Cook County (Record, 416-424); but upon appeals taken by parties not now before the court, but who claimed under a survey and subdivision of the lake bed made in 1874, the Supreme Court of Illinois reversed said decree in part, and held that because the lake was meandered in the public surveys, its bed or the submerged lands within the same, did not pass to the patentees (Record, 478-9), but that such patentees took only to the water's edge.

The argument of the court in reversing the original decree was that although the lake was non-navigable, yet because it was meandered, the same principle should be applied to it as is applied to Lake Michigan; and therefore that the patentees took only to the water's edge, with a riparian interest (or littoral right) under which they were entitled to the benefit of accretions to their lands. (Record, 481.)

When the Supreme Court of the state thus decided, it remanded the cause to the Circuit Court of Cook County, Illinois, for further proceedings in conformity with the opinion, the effect of such opinion being to deny the proprietorship of the patentees or their assigns in any of the lands formerly submerged or constituting a part of the non-navigable lake, save only those which might be considered accretions. It was therefore necessary to await a rehearing in the court of original jurisdiction to which the case was so remanded, that is to say, the case did not become ripe for review in this court until a final decision thereof was reached.

Davis v. *Crouch*, 94 U. S., 514.
Fisher v. *Carrico* (*or Perkins*), *supra.*

Because the judgment of the Supreme Court of the state, as rendered in the first instance, was one of reversal, with a remanding order, but without specific directions for a decree, it became necessary to have further proceedings; and therefore there was not at that stage a final judgment in the suit. (Phillips' U. S. Sup. Ct. Prac., 206; *McComb* v. *Co. Coms. of Knox Co., supra.*)

But the judgment became final for the purpose of a writ of error from this court to the Supreme Court of Illinois, when the further proceedings resulted in the affirmance by that court of a decree supposed to embody the views expressed in the opinion remanding the case.

Fisher v. *Perkins* (*or Carrico*), *supra.*

THE CLAIM OF TITLE IN FEE TO THE SUBMERGED LANDS UNDER THE PATENTS FROM THE UNITED STATES HAVING BEEN DENIED BY THE STATE COURTS, THIS COURT HAS JURISDICTION TO REVISE THE DECREE.

Lessee of Pollard's Heirs v. *Kibbe*, 14 Pet., 353.
Mitchell v. *Smale*, 140 U. S., 406.
Shively v. *Bowlby*, 152 U. S., 1.

As was remarked in the opinion of this court in *Hardin* v. *Jordan*, 140 U. S., 371, "the question is as to the effect of that (the patent) title to the lake and the bed of the lake in front of the lands actually described in the grant."

There is revisory power here; and it is especially the province of this court, in such a case, to determine "the kind of title conferred by patent" under an Act of Congress, under which the lands were sold and conveyed. Lender v. *Kidder*, 23 Ill., 49.

II.

FULL TITLE AND PROPRIETORSHIP OF THE LAKE AND OF THE SUBMERGED LANDS THEREIN WAS IN THE FIRST INSTANCE IN THE UNITED STATES.

The Act of Virginia of October 20, 1783, and the deed of cession made thereunder on the 1st of March, 1784, gave full right of domain to the United States. (1 *Kent's Com.*, *258, 259.)

Angell on Waters, § 6, as to grants of territory carry-

ing with them a right of property in waters within the boundaries of the grants.

> "Over the public domain within a state, and the innavigable streams and lakes situated thereon, the United States has * * * the rights of a proprietor. * * * Also an innavigable stream or lake lying within the public domain is a part and parcel of the land itself, inseparably annexed to the soil, and as such passes to the patentee of the soil from the United States." *Pomeroy on Riparian Rights,* p. 46, Par. 32.

The title of Virginia prior to the making of the Deed of Cession to the United States was certainly as great as was that of William Penn under the grant to him; of which grant it was said in *Coovert* v. *O'Conner,* 8 Watts, 470, 477:

> "All rivers, lakes and streams comprehended within the charter bounds of the province, passed to William Penn in the same manner as the soil."

By the cession from Virginia "the United States obtained all the land and the title thereto, not previously granted."

> *President, etc., of Commons* v. *McClure,* 167 Ill., 23, 35.

As the court remarked in that case (*ib.,* 37), the perfect title of all the lands embraced in the Deed of Cession, aside from the possessions, the title of which was stipulated, "was ceded by Virginia to the United States."

The comprehensiveness of the proprietary rights of Virginia until it made the Deed of Cession, and of the United States thereafter until the state was organized, and thenceforth as to all unsold lands and non-navigable

waters, will appear when we observe how great had been the rights of the crown prior to the grant to Virginia.

> "The right of the King extends over all lands, as well such as are covered with water, as such as are not."
>
> *Rogers* v. *Jones,* 1 Wendell, *237, 256.

It was in the power of the crown to grant land and water, and even to include the right of fishing in navigable waters. (*Ib.*)

To a like effect is *Roe* v. *Strong,* 107 N. Y., 350.

On the admission of a state into the Union it acquires an interest in navigable waters; and such waters are in this respect distinguishable from those which are not navigable.

> *Cobb* v. *Davenport,* 3 Vroom (N. J.), 369.
> *Kanouse* v. *Slockbower,* 48 N. J. Eq., 42.

As to the latter, the state, when claiming title, must show a direct grant from the United States. No proprietary right or title to non-navigable waters passed to the State of Illinois upon its admission into the Union, save only under an actual cession to it by the United States.

But the state, as an incident to its sovereignty, and taking the same footing in this regard as the original states, acquired dominion over the navigable waters, as was declared in

> *Martin* v. *Waddell,* 16 Pet., 410, and
> *Pollard* v. *Hagan,* 3 Howard, 212, and in the more recent case of
> *I. C. R. R. Co.* v. *The People,* 146 U. S., 387.

The two former of those cases related to lands under tide waters. The last named case related to lands covered by Lake Michigan, which lake had been held by this court, and also by the State Courts, to be like a great sea; and this court, by Mr. Justice FIELD, said:

> "We hold * * * that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the great lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under the tide waters on the borders of the sea, and that the lands are held by the same rights in the one case as in the other, and subject to the same trusts and limitations."

III.

A DISTINCTION BETWEEN NAVIGABLE WATERS AND THOSE WHICH ARE NOT NAVIGABLE IN LAW OR IN FACT SHOULD NOT BE LOST SIGHT OF IN THIS CASE; FOR WE HAVE TO DEAL WITH A NON-NAVIGABLE BODY OF WATER.

The distinction has been observed in the acts of Congress. Rev. Stat. U. S., § § 2476. 5251.

Kirkpatrick v. *Yates Ice Co.*, 45 Mo. App., 335, states the correct doctrine on this subject.

As the lake was in fact non-navigable, did it pass to the state, in the public surveys, because the deputy surveyor meandered it?

Issue is taken with the State Court on that question.

What part of the public domain passed to the State of Illinois on its admission into the Union?

On the admission of Illinois into the Union it did not

take title to non-navigable bodies of water within its limits, nor did the United States hold these in trust for the state as it had held the navigable bodies of water.

When the State of Illinois applied for admission into the Union an ordinance was passed by that state accepting certain propositions made by Congress the 18th of April, 1818, by what is usually called the Enabling Act. (Rev. Stat. of Ill., Hurd, 1899, p. 27.) Under the first of such propositions Section 16 in every township, or in certain cases an equivalent, was to be granted to the state for the use of the inhabitants of such townships for the use of schools. The second and third of such propositions related to Salt Springs, which the state was to be allowed to manage, and provided for an appropriation of five per cent. of the net proceeds of the lands lying within the state, which percentage of such net proceeds was in part to be disposed of under the direction of Congress in making roads leading into the state, and partly to be appropriated by the Legislature of the state for the encouragement of learning. A fourth proposition provided that the President of the United States might designate thirty-six sections, or one entire township, to be designated by the President as being reserved that the same might be vested in the state for the use of a seminary of learning.

But otherwise than as was provided in said Act of Congress, and the ordinance accepting the same, the state acquired no title to any of the lands within its limits.

It would follow that a principle declared in Article 4 of the Ordinance of July 13, 1787, for the government of the territory of the United States north-west of the

Ohio, was tacitly recognized or affirmed by the state when it came into the Union.

That principle was that the Legislature of the state should never

> *"interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may (might) find necessary for securing the title in such soil to the bona fide purchasers."*

It is not intended to maintain that the Ordinance of 1787 remained in force after the admission of the State of Illinois into the Union. For the principle relied upon, affirming the absolute proprietary right of the United States, is predicated on other grounds.

The proprietorship of the United States was so full and complete that nothing which could be done by the State Legislature could interfere therewith. Much less could a court of the state contravene the right or power of the United States. As was stated by Mr. Chief Justice MARSHALL in *Johnson* v. *McIntosh*, 8 Wheat., 543, 586, the Deeds of Cession to the United States, including the Deed from Virginia, "ceded the soil as well as jurisdiction to the United States."

No limitation affecting full proprietorship was expressed in the Deed of Cession from Virginia, nor was such proprietorship as to any private waters relinquished by the United States in any manner by the admission of the State of Illinois into the Union. Indeed, the provisions of the aforesaid ordinance of Illinois fully recognized such proprietorship.

Nor was any land belonging to the United States to be disposed of, except by the authority of Congress. This

follows from a provision of the Constitution of the United States, Art. IV, § 3, Par. 2, giving the Congress power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.

As was announced by this court in *Gibson* v. *Chouteau*, 13 Wall., 92:

> "*The power of Congress in the disposal of the public domain cannot be interfered with, nor its exercise embarrassed by any state legislation.*" * * *

The court remarked:

> "*With respect to the public domain the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations.* * * * *No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.*"

In the same case it was declared that:

> "The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. * * * The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance."

So it was held in *Irvine* v. *Marshall,* 20 How., 558, that:

> "All the lands in the territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous."

Also, that:

> "A territory cannot, by its law, interpose and dictate to the United States, to whom, and in what mode, and by what title, the public lands shall be conveyed."

The court, by Mr. Justice DANIEL, remarked:

> "The system adopted for the disposition of the public lands * * * is peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone."

In *Wilcox* v. *Jackson,* 13 Pet., 498, counsel had argued at the bar that:

> "The State of Illinois had a right to declare by law that a title derived from the United States, which by their laws is only inchoate and imperfect (as, for example, resting on a pre-emption), shall be deemed as perfect a title as if a patent had issued from the United States."

But the court held that:

> "Whenever the question in any court, State or Federal, is, whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States."

In *Bagnell* v. *Broderick*, 13 Pet., 436, the court, speaking by Mr. Justice CATRON, said:

> "Congress has the sole power to consider the dignity and effect of titles emanating from the United States."

Paige v. *Peters*, 70 Wis., 178, 182, fully adopts the doctrine,

> "that whenever the question in any court, State or Federal, is whether a title to land, once the property of the United States, has passed, that question must be resolved by the laws of the United States,"

citing

Wilcox v. *McConnell*, 13 Pet., 516, 517.
Irvine v. *Marshall*, 20 How., 564.
Gibson v. *Chouteau*, 13 Wall., 92.
Seymour v. *Landers*, 3 Dillon, 440, 441,

and Mr. Justice CASSODY said:

> "Upon such a question the decisions of the Supreme Court of the United States are, of course, binding upon the State Courts."

In *Gilmore* v. *Sapp.*, 100 Ill., 297, 303, presenting a question when a patent became effective, the court said of a decision of this court, there noticed:

> "As this decision relates to a construction of an Act of Congress, it is authoritative and binding on all other tribunals."

In the case before us it will be for the court to declare again what was the purpose or effect of the meandering of the lake; the Supreme Court of Illinois, in its opinion, differing from this court on that subject.

The running of a meander may have been appropriate enough, but it was certainly not intended either by the surveyor or the Commissioner of the General Land Office to divest the United States of proprietorship.

That it did not divest the United States of title will appear from various considerations.

It was not in the power of the General Assembly of the state by its Fishery Laws or otherwise to impair the efficacy of the grants from the United States, any more than it was within the power of the Legislature of Minnesota to say that the lake bed should be held in common or in joint ownership when in fact the patents gave rights in severalty.

Shell v. *Matteson,* 81 Minn., 38.

The case is cited as illustrative. The State of Illinois in establishing a Fish Commission, as it did in 1879, never intended to appropriate any non-navigable lakes or waters to its own use.

IV.

NO EFFECT ADVERSE TO FULL PROPRIETORSHIP UNDER THE PATENTS FROM THE UNITED STATES, SHOULD HAVE REEN GIVEN TO THE MERE FACT THAT THE LAKE WAS MEANDERED.

The Supreme Court of Illinois, in its decision of this case, held that meandered lakes, though non-navigable, are within the control of the state, and subject to be treated just as if they were public waters or non-navigable waters . But the court gave a significance to the meander which is inconsistent with the laws of the United States in respect to the survey and sale of the public lands.

The opinion of Mr. Justice PHILLIPS in the present case may be said to have conceded substantially, that the title to the lake bed or to the lake was originally in the

United States. Such at least would be an inference from the argument contained in the opinion.

Fuller v. *Shedd*, 161 Ill., 462.

The question was stated by Mr. Justice PHILLIPS, in the opinion in that case, to be,

> "whether the riparian owner of the lands meandered on a lake by the original survey takes to the water's edge as meandered, or takes to the center of the lake."

Proceeding towards a decision of that question, the learned justice denied the force of the objections made to the survey of 1834-5. He disagreed with the contention that there was any obvious mistake or fraud in the survey; and in this respect agreed with the decisions previously made by this court. But the reasoning of his honor was in other respects peculiar.

For (1), he held that while the grant by patent of the land on a river in Illinois would give title to the middle thread of the current, there was not the same reason for construing a grant of land on a meandered lake as extending to the center of the lake. Why was the distinction made? He assigned as a reason that,

> "The irregular borders of a lake would render the determination of lines in the bed of the lake between riparian proprietors of almost impossible solution." (*Ib.*, 483.)

And, again (2), reviewing some cases on this subject, beginning with certain of them which were not based on the common law, but were governed by other considerations, or by ordinances passed while title was in the colony and before many sales had occurred, the learned justice proceeded to say:

> "A principle applied to a large lake is a principle applicable to a smaller one. This principle applies

> to such as are meandered in the original survey." (*Ib.*, 489.)

The court thereupon concluded that the view taken by this court as to what was the common law rule would not be recognized; but that the view which had been expressed in *Trustees of Schools* v. *Schroll,* 120 Ill., 509, was the law of Illinois, and should be taken to be "the common law."

The learned justice would treat this non-navigable lake as if it had all the characteristics of a navigable water, even one like Lake Michigan. Assigning it first to the class of non-navigable waters, he treats it as a navigable lake.

Yet, and this is to be marked as an inconsistency, the court then took up the question whether the lake bed passed to the state under the Swamp Land Act.

Why, as we may ask, would his honor do so, after having put the lake in the class of public waters because it was meandered? He remarked:

> "Prior to 1850 there were many lakes similar to those in this record referred to, in many of the states, which induced the passage of the Swamp Land Act, with the amendments."

He then suggested, in substance, that whilst that act operated as a grant *in praesenti,* yet it was a question for the decision of the secretary of the interior whether a particular tract was swamp land; and it being found from the record that at a hearing before the Land Officers, under the supervision of the General Land Office, and of the department of the interior, the claim made by the state and by the County of Cook to these lands as swamp lands was rejected, the determination by the offi-

7501

cers of the United States was held to be conclusive on the parties, except in a direct proceeding. Hence, it was determined that the County of Cook had no claim on the lands in this case; and further, that the survey of the lake bed was without any right on the part of the Commissioner of the General Land Office to make such survey. The reason for the latter determination was that:

> "Riparian proprietorship is a property right of value, and to it are attached rights and privileges conferred by law, of which the owner cannot be deprived by an illegal proceeding."

Now, if the submerged lands had belonged to the state by reason of the lake having been meandered, there was no occasion for considering the question whether they passed by the Swamp Land Grant. The only logical reason for taking up the question was that the title thereto had been in the United States, and must have gone to the patentees under the survey of 1834-5, or to the state under one or the other of the grants of September 20, 1850, and September 28, 1850, *supra*. For if the title was in the United States, there was necessity for the passage of one of those acts (Record, 92, 93), to transfer or convey such title to the state. But the state did not then, or at any time since, so far as is known, claim title to any lake bed lands because of the meander of the lake, or for any other reason than because of the grants by the said Acts of Congress, or one of them.

Many small non-navigable lakes in the State of Illinois, as we suppose is the case elsewhere, were meandered; but in no other case has any claim been made in behalf of the state as arising from the fact of such meander.

In this particular, an observation made by Mr. Justice BRADLEY in the opinion of the court in *Mitchell* v. *Smale, supra,* is to be noticed. In language quoted by the Supreme Court of the state (Record, 473-4), he said:

> "Nor do we mean to say that in granting land bordering on a non-navigable lake or stream the authorities might not formerly, by express words, have limited the granted premises to the water's edge and reserved the right to survey and grant out the lake or river bottom to other parties. *But since the grant to the respective states of all swamps and overflowed lands therein this cannot be done.*"

The Acts of Congress concerning public lands and the survey thereof made no provision in terms for meandering streams or bodies of water.

In the subdivision of a township into sections, the marking of three outer corners of each quarter section seems to have been necessary. (Record, 388.) The surveyor was to note in his field books the true situation

> " * * * of all water courses over which the line he runs may pass, and also the quality of the lands." (Act of May 18, 1796, § 2; Rev. Stat U. S., § 2395.)

He was to return his field books to the Surveyor General, who was to cause therefrom a description of the whole land surveyed to be made out and transmitted to the officers who might superintend the sales. Such Surveyor General was to cause a fair plat to be made of the townships and fractional townships, describing the subdivisions thereof, and the marks of the corners.

The making of the plat would necessitate the estimation of the areas of fractions especially, and the notes of a meander of either lake or river would facilitate the making of the estimate. *But such meander did not oper-*

ate either as a reservation by the United States, or on the other hand as a grant to the state.

The plat was to be recorded, and a copy of it was to be kept open at the Surveyor General's office for public information, and other copies were to be sent to the places of sale and to the General Land Office.

The survey of 1834-5 was undoubtedly regular, and in accordance with the law.

The Supreme Court of Illinois, in all its decisions on the subject, at least up to the time of the decision of this case, has been in accord with this court in treating the meander of a body of water in the government surveys as having been run, not as a limitation upon boundaries, but for showing the water as a boundary, and ascertaining quantities approximately.

Meander lines, said Mr. Justice CLIFFORD, in *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. (7 Wall.), 272, Book 19 Law. Ed., 74, are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of a tract, but for the purpose * * * of ascertaining the quantity of land in the fraction subject to sale and which is to be paid for by the purchaser."

In *Middleton* v. *Pritchard*, 3 Scam., 510, the court declared:

> "The meandering is for the purpose of ascertaining the quality of land,"

and that view of the law has been taken, in a long line of cases, including:

Houck v. *Yates*, 82 Ill., 179, and
Fuller v. *Dauphin*, 124 Ill., 542.

And, as this court remarked in *Hardin* v. *Jordan, supra,* it has never been held that the lands under water in front of grants (by the United States) are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees.

V.

IT WAS NOT IN THE POWER OF THE SURVEYORS WHO RAN THE MEANDER AND RETURNED THEIR FIELD BOOKS TO THE SURVEYOR GENERAL TO PUT THE LAKE IN THE POSITION OF A PUBLIC WATER BY MEANDERING THE SAME; NOR WAS IT IN THE POWER OF THE SURVEYOR GENERAL IN MAKING THE PLAT, TO MAKE THE LAKE A NAVIGABLE BODY OF WATER BY CALLING IT "NAVIGABLE LAKE" AS TO THE ILLINOIS PORTION.

(ON THE PLAT OF THE PART OF IT IN INDIANA IT WAS ONLY DESIGNATED AS "LAKE.")

NEITHER THE ACT OF RUNNING THE MEANDER, NOR THE DESIGNATION ON THE PLAT OF THE LAKE ITSELF, COULD MAKE THE LAKE OTHERWISE THAN A NON-NAVIGABLE LAKE; IT BEING, IN FACT, AS THE COURTS HAVE ALL FOUND, NON-NAVIGABLE. THE FACTS AS TO THE CHARACTER OF THE BODY OF WATER CHARACTERIZED IT, OR PLACED IT IN THE CATEGORY OF NON-NAVIGABLE. THE DESIGNATION WHICH HAPPENED TO BE GIVEN IT ON THE PLAT WAS BUT FANCIFUL OR ACCIDENTAL, AND DID NOT BAR INQUIRY AS TO THE FACTS; NOR, ON THE OTHER HAND, SHOULD THE SURVEYOR'S MEANDER TAKE THE LAKE FROM THE CLASS PROPERLY KNOWN AS PRIVATE WATERS AND PERPETUALLY ASSIGN IT TO THE CLASS OF PUBLIC WATERS.

MOREOVER, THE DECISION OF THE CONTEST IN THE LAND OFFICE DISPOSED OF THE CLAIMS OF THE STATE.

A long litigation is displayed by the record. It has included contests in the Land Offices, local and general. Its theater was transferred from the State Courts to the Federal Courts by claimants under the survey of 1874; and two decisions in regard to it were made in this court in 1891; to one of which decisions one of the present plaintiffs in error was a party, and to the other of which (*Mitchell* v. *Smale, supra*), defendant in error Shedd was a party, prosecuting the writ of error therein, though in the name of his grantor, Mitchell. The courts of Illinois were also, as we have seen, called upon later to make an expression, especially as to the contest resulting from the survey of the lake bed, and they sustained the original government survey; but chose to put an interpretation upon the rights of the patentees under that survey different from that which had been given by this court, and suggested as a reason for so doing that the lake represented by the plat was meandered in such survey.

But no magical effect should be given to the meander; and when we find that it was a lake which was meandered, we should recognize the fact, which has been clearly shown, that it was a non-navigable inland water which was meandered; a water which, with the submerged land under it, belonged at the time to the United States; a water which was in no manner reserved by the patent; a water, therefore, which, as was remarked by Mr. Justice BREWER, in *Niles* v. *Cedar Point Club*, 175 U. S., 300, 308, is "generally the property of riparian owners."

As the court there held, in respect to the State of Ohio, it might be enough to say here that the State of Illinois, having in a contest in the Land Office claimed under the Acts of September 20, 1850, and September 28, 1850, *supra,* respectively; and its claim having been denied, no such claim should be litigated in this suit; and for this reason it was an error in the Supreme Court of Illinois to hold that the state was entitled to the submerged lands because the lake was meandered.

The State of Illinois, both for itself and under the Swamp Land Grant, appeared in the contest in the Land Office in the present instance. (Record, 92, 105.)

The judgment of the Land Department upon the matter *"was that of a special tribunal, and unassailable except by direct proceedings for its annulment."*

> *Steel* v. *St. Louis Smelting & Mining Co.,* 106 U. S., 447; (27 Law. Ed., 226).

It concluded the state, not only as to the claims it explicitly made, but also as to any it might have made in the contest. For, as was held in *Dowell* v. *Applegate,* 152 U. S., 327 (38 Law. Ed., 463, 470):

> *"A judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been set up."*

But when the state constantly taxed the lake bed lands, as the record shows it did, it conceded private ownership thereof. (Record, 419-421, 444- 5.)

VI.

THE DISTINCTION BETWEEN PUBLIC WATERS AND THOSE WHICH ARE PRIVATE DOES NOT REST UPON THE ACTION OR NON-ACTION OF A MINISTERIAL OFFICER CONNECTED WITH PUBLIC SURVEYS. IT IS NOT IN THE POWER OF A DEPUTY SURVEYOR OF THE UNITED STATES, NOR OF ANY OFFICER CONNECTED WITH THE SURVEYS, NOR, INDEED, OF ANY BRANCH OF THE EXECUTIVE DEPARTMENT, TO DETERMINE THAT A NON-NAVIGABLE LAKE IS, OR SHOULD BE TREATED AS, A PUBLIC WATER. THE QUESTION WHETHER AN INLAND OR NON-TIDAL BODY OF WATER IS NAVIGABLE IS A QUESTION OF FACT; A POSITION ILLUSTRATED BY

Healy v. *Joliet & Chicago R. R. Co.*, 116 U. S., 191.
Hubbard v. *Bell*, 54 Ill., 110.

In *Rice* v. *Ruddiman*, 10 Mich., 125, the court did not consider that Muskegon Lake, which had an outlet into Lake Michigan (p. 137, *id.*), and was affected by the rise or fall of the latter, was subject to be treated as a part of or in character like Lake Michigan. On the contrary, it was held to be subject to private ownership, in respect to submerged lands within the lake limits; an ownership, however, which, as in the case of rivers, was "subordinate to the paramount right of navigation, and such other public rights as may be incident thereto." (*Ib.*, 140.)

The tidal waters are by the common law public. There are also waters which, under the Acts of Congress, are navigable, when the same are in fact navigable. Some

were by the ordinance of 1787 to be highways; for the ordinance declared that:

> "The navigable waters leading into the Mississippi and the St. Lawrence and the carrying places between the same shall be common highways and forever free, etc." (Art. IV of said ordinance.)

Congress, following the principles of the ordinance, declared (Rev. Stat. U. S., § 2476):

> "All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

But there is a material distinction between public waters, or such as are navigable by law or in fact, and such as are not navigable. The distinction is frequently important in the construction of grants of lands having waters as boundaries. The question naturally arises, what interest had the grantor in the soil under the water? Did his boundary fall at the line of high water or low water on the sea shore or on a tidal water? If a navigable water was a part of his boundary, what, if any, title had he to the soil under the water; or, if his lands were on a non-navigable water, how far therein did his boundary extend?

It would be an error to suppose that this court has held that the question, how a grant by the United States of land bordering upon non-navigable waters should be construed, will be left to each state to determine for itself. No decision to that effect has been made by this court. If there has been an impression that this court has sanctioned a doctrine that the State Courts, respectively, may each one for itself determine whether the proprietary in-

terest originally in the United States as to the bed of non-navigable streams or waters passes under a government patent for land bordering on such waters, such impression is erroneous. Such reach of decision has not been allowed to the State Courts in such cases, nor can they deprive the patentee of his right to the fee according to common law principles, where these have prevailed, or should prevail, as to non-navigable waters in the public domain of the North-western territories and the states formed therefrom.

The doctrine laid down by this court in *Packer* v. *Bird*, 137 U. S., 661 (34 Law. Ed., 819), still prevails; but it continues to be applicable only to navigable waters, to such as are navigable in fact, including the great rivers made public highways by Congress. There it was stated that it is undoubtedly the

> "rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the rivers are affected by the tides, the title of such owners is limited to the ordinary high-water mark."

The court said that a different test from that which was applied in England to "determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner," was proper; such test being found in their navigable capacity.

> "Those rivers are regarded as public rivers in law which are navigable in fact, * * * navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

From the cases which have been decided by this court, beginning with *Genesee Chief* v. *Fitzhugh,* 12 How., 443, the term "navigable waters" of the country has come to be fairly well understood.

As was held in *Barney* v. *Keokuk,* 94 U. S., 324 (24 Law. Ed., 224), citing certain preceding cases of this court, to wit:

Martin v. *Waddell,* 16 Pet., 367;
Pollard v. *Hagan,* 3 How., 212.
Goodtitle v. *Kibbe,* 9 How., 471.

relating to tide waters, enunciated "principles which are equally applicable to all navigable waters"; and it was declared by this court,

> "that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are in the strictest sense entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction."

The court therefore said:

> "There seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending, if it could extend, its survey and grants beyond the limits of high water."

This court, therefore, in the case of *Barney* v. *Keokuk, supra,* agreed with the determination of the Circuit Court of the United States for the District of Iowa, and in doing so followed certain Iowa cases, enunciating the doctrine that the title of the riparian proprietor in a particular case of land "on the banks of the Mississippi River, extends only to high-water mark," and that "the shore

between high and low-water mark, as well as the bed of the river, belongs to the state."

The court also said:

> "This is also the common law with regard to navigable waters; although in England no waters are deemed navigable except those in which the tide ebbs and flows. In this country, as a general thing, all waters are deemed navigable which are really so, and especially it is true with regard to the Mississippi and its principal branches."

In *St. Paul & Pac. R. R. Co.* v. *Schurmeier, supra,* the distinction between streams navigable and those not navigable was especially considered, and Mr. Justice CLIFFORD, in delivering the opinion of the court, said:

> "Proprietors bordering on streams not navigable, unless restricted by the terms of their grant, hold to the center of the stream."

But further:

> "Many Acts of Congress have provided that all navigable rivers or streams in the territory of the United States offered for sale shall be deemed to be and remain public highways." (Quoting certain statutes.)

The learned justice also remarked:

> "It is quite clear that Congress did not employ the words 'navigable' and 'not navigable' in the common law sense, but in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership shall apply to lands bordering on the latter, but the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

It was said, on the authority of *Dutton* v. *Strong,* 1 Black, 23, that although such riparian proprietors (hav-

ing lands on navigable waters) are limited to the stream; "still they also have the same right to construct suitable landings and wharves for the convenience of commerce and navigation as is accorded proprietors bordering on navigable waters affected by the ebb and flow of the tide."

When the Congress suggested the distinction between navigable rivers and those not navigable, or as in the Act of March 3, 1811, put navigable rivers and waters in the former territories of Orleans and Louisiana in a class by themselves as public highways, the courts might reasonably notice the distinction. It was appropriate, too, because of geographical conditions being different here from those in England. Therefore it may be said to have been proper for the courts to adopt the enlarged meaning of the word "navigable," or the more comprehensive meaning suggested by Congress; and consequently it might well be concluded, as Mr. Justice CLIFFORD, in the Schurmeier case, *supra*, suggested, that Congress,

> "in making a distinction between streams navigable and those not navigable, intended to provide that the common law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways."

Congress led the way in recognizing an enlargement of meaning of the word "navigable." Therefore, the courts have in some states treated the beds of navigable rivers therein as being held by such states in their sovereign capacity, because of the feature of navigability, like as if they were navigable at common law, which claim on the part of such states this court has not denied. Why? The answer is because such waters being navigable in

fact, may in this regard well be so treated, especially in cases in which the bordering lands have passed into private ownership. However, in language used by the court in *Barney* v. *Keokuk, supra:*

> "If they (the states) choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

But very great is the difference when non-navigable waters are to be considered, in cases in which the states could get these only by direct grant. Without such grant they should not despoil the proprietors of their common law rights therein, nor can they properly limit such rights in any of the essential features of ownership.

It might well be said that if Congress had not legislated in the manner noted, the states could not have claimed in their sovereign capacity, and independently of grants, the navigable rivers above the ebb and flow of the tide.

In *Packer* v. *Bird,* 137 U. S., 661 (34 Law. Ed., 819), the River Sacramento was found to be a navigable river, one of the great rivers of California. The court noticed the Act of Congress of May 18, 1796, in which it was declared that:

> "All navigable rivers within the territory to be disposed of by virtue of the Act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both."

So the court affirmed the judgment of the Supreme Court of California, bounding the lands of the plaintiff on the Sacramento River, and not including therein an

island which was the subject of controversy, and which would, as is supposed, have been included with the plaintiff's lands if such lands had been allowed to extend to the middle of the stream; such decision being supposed to be in accordance with common law principles, giving, however, the word "navigable" its full significance as applied in the Acts of Congress, and as adapted to this country.

But it is to be remarked that no intimation was given in any of the cases reviewed that the common law had been changed by Acts of Congress applicable to the interior waters of the country not navigable. No surrender to the states of the beds of the same could follow from any correct application of the common law to the grants of the United States in disposing of the public lands according to the Acts of Congress. The distinction drawn by the Acts of Congress would itself forbid any application to such interior non-navigable waters of principles which pertain to navigable waters alone.

The public lands of the United States bordering on interior waters that are not navigable, would have been of comparatively little value if such waters had passed to the states, respectively, by virtue of their sovereignty; and innumerable difficulties as to boundaries, and from conflicting claims on the part of settlers, would have arisen.

As was said by Mr. Justice BRADLEY, in *Hardin* v. *Jordan, supra:*

> "When land is bounded by a lake or pond, the water, equally as in the case of a river, is appurtenant to it. It constitutes one of the advantages of its situation, and a material part of its value, and enters largely into the consideration for acquiring

it. Hence, the presumption is that a grant of land thus bounded is intended to include the contiguous land covered by water."

Where the courts of the states, as, for instance, in the State of Iowa, and the State of California, recognized the enlarged definition of navigable waters given by Congress, and thereunder limited the rights of riparian owners to high-water mark, allowing such owners the privileges of wharfing and the like, this court gave its sanction in construing grants within those states, but "subject to the condition that their (the states') rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee."

This court, however, declared, in *Packer* v. *Bird*, *supra:*

> *"The courts of the United States will construe the grants of the general government, without reference to the rules of construction adopted by the states for their grants."*

This court only allowed a voice to the states in view of the action of Congress, sanctioning a claim of sovereignty in a state over navigable waters (navigable in fact); therefore, allowing such states to construe grants of bordering lands on navigable rivers as extending but to low water or high-water mark, or equally allowing other states to follow the common law as to all waters, navigable and non-navigable alike.

There was but little, if any, occasion for the Swamp Land Act, granting "Swamp and Overflowed Lands," if the swamp and overflowed lands belonged to the states when within meandered streams or bodies of water; many such streams and bodies of water having remained unaffected by sales or grants made by the Government prior to the passage of the Swamp Land Act.

As to the interior non-navigable bodies of water which belonged to the United States and constituted a part of the public domain, it was never intended that the extent of the grants according to common law principles should be subject to be determined by the states; one state claiming by virtue of its sovereignty the ownership of the beds of such bodies of water, and another state following the principles of the common law and allowing the grant to extend to the center of the body of water. One common rule was applicable to the government grants of lands bounded by non-navigable waters, inclusive of the small interior lakes not navigable; and no departure from the common law as to grants of such lands can properly be asserted as having been in the mind of Congress in any Act relative to the public lands.

As was stated by Mr. Justice BRADLEY, in *Hardin* v. *Jordan, supra:*

> "A lake or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equidistant from the line on either side."

Holding to the view that the interpretation of a grant by the general government of lands on interior non-navigable waters is left ultimately to the decision of this court, it is submitted that the patentee of lands bounded by such waters, wherever such lands are situated, in the North-west territory, is entitled to full common law rights, not subject to be defeated by the decisions of a State Court, assuming for the state a sovereignty as to such waters, or declaring that the policy of the state should give the state a title not granted to it by any competent authority.

As was said in *Lux* v. *Haggin*, 69 Cal., 255:

> " * * * There is no public policy which can empower the courts to disregard the law, or, because of an asserted benefit to many persons (in itself doubtful), to overthrow the settled law."

And again, said the court in that case:

> "This court has no power to legislate, especially none to legislate in such manner as to deprive citizens of their vested rights."
>
> (10 Pac. Rep., 697.)

VII.

THE PRESUMPTION IS IN ORDINARY CASES THAT A DEED FOR A TRACT HAVING WATER FRONTAGE CONVEYS AS FAR AS THE GRANTOR OWNS.

As was stated by Mr. Justice GRAY, in *Paine* v. *Woods*, 108 Mass., 160-169:

> "The general rule of construction of all grants of land bounded by water of any kind is now well established, that, unless qualified by restrictive words, they pass the soil towards the center of the water as far as the grantor owns."

Recognition of that principle has been usual in the Illinois cases. It was applied in *Trustees of Schools* v. *Schroll, supra,* in holding the title to be in the Trustees of Schools *to a part of Meredosia Lake under a grant from the United States;* and so in the case of *Bristol* v. *County of Carroll*, 95 Ill., 84, recognition of the title of the County of Carroll to a part of a meandered lake was given as coming under the Swamp Land Grant.

As was said in *Hogg* v. *Beerman*, 41 Ohio St., 81:

> "A proprietor may convey all his rights to a grantee, unless forbidden by some law to which he is subject. *No one not possessed of some right in*

the thing granted should be heard in objection. Where the grantor is the government, the thing granted government property held by absolute title, and no use of the thing granted to which the public is entitled is taken away, we see no reason for denying to the grantee ownership of the thing granted."

Middleton v. *Pritchard, supra,* is authority not only as to the reason why the surveyor's meander was not to be considered a boundary, but also for the proposition that:

"Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it."

(S. C., 38 Am. Dec., 113.)

An express exception in the grant, or something equivalent to it, is usually necessary to limit the grantee to the edge of the water, when the grantor, having title to the water, or the submerged land thereunder, conveys lands with the water as a boundary.

3 Kent's Com., *428.

Elphinstone on Interpretation of Deeds, 182-3.

VIII.

THE SUPREME COURT OF ILLINOIS COULD NOT PROPERLY PLACE A NON-NAVIGABLE LAKE IN THE LIST OF NAVIGABLE WATERS. IT SHOULD HAVE BEEN TREATED THROUGHOUT, AND CONSISTENTLY, AS NON-NAVIGABLE.

The principal reason assigned for treating it as a public water, to wit: that it was meandered, was considered in *Shell* v. *Matteson,* 81 Minn., 38 (83 N. W., 491), and it was there held that the owners of lands bordering on

the shore of such a lake owned the bed thereof, their title extending to the center; and that an act of the State Legislature declaring that the shore owners should hold the bed of such lakes in common, and providing for so dividing the same was "an invasion of private rights," and was unconstitutional.

It might not appear with much certainty, from reading the opinion of the court by Mr. Justice PHILLIPS, in the case under review, that the court intended to say that the title to the lake bed was ever in the State of Illinois, either by reason of the lake having been meandered or otherwise. Expressions in the opinion are quite inconsistent with that view. Some of these have been noted, especially in following up the inquiry by the court whether the state took title under certain Acts of Congress; from which inquiry it was found that the state did not take title, and also that the state was in that regard concluded, for the purposes of this case, by the decision adverse to it in the Land Office. Yet it would seem that because of the supposed difficulty in making a division of the lake bed between the owners of land bounded by the lake, and because of a supposed policy of the state, indicated by certain steps taken in recent years, it is said,

> "to stock its waters, both lakes and streams, with fish, as a means of giving cheap and valuable food to its citizens,"

a small lake when meandered would, in the opinion of the court, be subject to be treated like the Great Lakes, including Lake Michigan. In connection with that announcement, the court used language deprecating the idea that

> "the small non-navigable lakes should become the private waters of riparian owners, * * * with exclusive rights thereon of boating, fishing and the like."

The court seemed to forget that certain incidents would be applicable to non-navigable waters, as well as to those which are navigable, and that the police power of the state might be applied to any such waters, as is shown, for example, by *Parker* v. *The People,* 111 Ill., 581, as to a river. But the same principle was adopted as to a lake in *People* v. *Bridges,* 142 Ill., 30, reviewing the decisions in various states, and citing approvingly *Beckman* v. *Kreamer,* 43 Ill., 447, noticed later.

The decree of the Circuit Court of Cook County had itself made provision amply protective of the rights of the shore owners in common in the matter of fishing and boating. (Record, 424.)

All rivers in Illinois, including that part of the Mississippi River which is within the state limits, are subject to private ownership of the bed, the adjoining proprietors taking to the middle thread of the stream. This is so as to the rivers which were meandered. All of these which are navigable, in fact, are subject to the public easement as to navigation, and as to fishing, boating and the like, their waters are vastly more important than are those of the inland lakes of the state.

The official plat of the survey of 1834-5 shows that the "Little Kalamick" River was meandered as well as the lake. But did such meander signify a reservation or a surrender to the state of its bed? Or did it make any difference with the rights of persons who became patentees of lands abutting on the river? Certainly not, as will be seen from *Washington Ice Co.* v. *Shortall,* 101 Ill., 46. So in *Canal Trustees* v. *Haven,* 5 Gilman, 548, a grant from the United States to the State of Illinois of the school section was held to include the bed of the

Des Plaines River running through the same, although the river was meandered in the public survey.

Reasons for private ownership of the beds of the streams in this state were forcibly stated in the case of *Braxon* v. *Bressler*, 64 Ill., 488.

In *City of Chicago* v. *Laflin*, 49 Ill., 172, the court held that the meander of Chicago River did not operate as a reservation by the United States, and that a grantee from the United States of a lot bordering on that navigable stream took ownership to its center or middle thread, subject to the public easement of passing over the stream as a highway.

Calumet River Ry. Co. v. *Sheaff*, 164 Ill., 453, decided in 1897, was more in accord with the views of this court in *Hardin* v. *Jordan* and *Mitchell* v. *Smale, supra*, the decree as affirmed showing that the title passed from the United States to the patentee Stephen A. Douglas, in respect to the submerged or lake bed portion of one of the tracts which was within or a part of the lake in question here under the survey of 1834-5. In that case the court did not require the petitioners holding title under a patent from the United States, according to the plat of the survey, to show that the land claimed by them consisted of accretions, nor that the lake (which is now under consideration) had dried up.

The final decree in this case asserted title in a measure with power of control in the state (Rec., 439-40), and such decree now under review here, was affirmed in 177 Ill., 128 (Rec., 484).

But in *Hammond* v. *Shepard*, 186 Ill., 235, the court distinctly announced that shore owners on meandered lakes take title only to the water's edge, the title to the bed of the lake being in the state.

The last named case involved a part of Sunfish Lake, in Township 24 North, Range 4 East, Carroll County, Illinois. This is the same lake which was referred to in *Bristol* v. *County of Carroll, infra,* the part of which was involved in the latter case, being in the next township south, namely, in Township 23 North, Range 4 East. The portion of lake in both townships was meandered.

Map No. 13 herein is a copy of the government plat of the original survey in Township 24.

The portion of the island involved in the Hammond case is a fraction, 3.39 acres, in what would be the east half of the northwest quarter of Section 31 if a full eighty acre subdivision; and the claim of Shepard was of the east half of the northwest quarter of Section 31, partly under the limitation laws, because of color of title and payment of taxes and possession. (P. 241 of 186 Ill.) The court held that the evidence was insufficient to take away from the state its title to the former bed of the lake, and therefore that Shepard, the plaintiff in the ejectment, had shown himself to be entitled to recover only the 3.39 acres, the evidence as to accretions thereto being imperfect.

As against the state, if it held title, the defense of a bar by limitation could not have been availing and such defense was considered in the case. But it would seem that the patent for the 3.39 acres was to Funk, as Drainage Commissioner, acting, of course, under the Illinois Act of June 22, 1852. (Sess. Laws of Ill., 1852, p. 178, Scates' Comp., 1148, *et seq.*) Limitation laws might have been applied to the county under a suitable state of facts; so it is a query whether the court considered the state as a party in interest as to the

MAP No. 13.

Lake
Island
Sec. 30
Sec. 31
Sec.
64
79
39
39.96
39.97
19.98
38.05
40.00
40.00
26.72
40.00
43.43
20.20
44.85
50.77
58.57
30.50
34.46
80.00
60.15
12.00
Ac 10.42
Ac 76.44
Ac 14.2
Ac 10365
50.34
28.00

supposed lake bed, that is, a party having had an interest in its sovereign capacity.

The case illustrates an anomalous position in which to put the state, if it be supposed that the court intended to hold that the state had title by right of sovereignty in respect to a part of the lake because it was meandered, when in fact, as appears from *Bristol* v. *County of Carroll, infra*, the state took title under the Swamp Land Grant.

The proprietorship must, from such instances, seem to be very ambulatory.

The strong announcement made by the court in the Hammond-Shepard case may be taken as indicating the construction intended to be put by the court on its ruling in this case.

However, when Mr. Justice WILKIN stated in the *Hammond-Shepard* case (186 Ill., 241):

> "The law of this state, as repeatedly announced, is, that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state,"

he could only have referred to *Trustees of Schools* v. *Schroll, supra*, and the present case (under the title of *Fuller* v. *Shedd*), as speaking directly on the subject, but in neither instance speaking with anything like the significance which he supposed.

IX.

UNTIL THE TIME OF THE DECISION OF THE PRESENT CASE THE SUPREME COURT OF ILLINOIS RECOGNIZED THE ORIGINAL PROPRIETORSHIP OF THE UNITED STATES OF INLAND LAKES, AND DID NOT HOLD THAT THOSE OF THEM WHICH WERE MEANDERED IN THE PUBLIC SURVEY PASSED THEREBY TO THE STATE OF ILLINOIS.

Beckman v. *Kreamer, supra,* was decided in 1867. It was mentioned in *Hardin* v. *Jordan, supra,* as indicating the view of the Supreme Court of Illinois as to the common law, or as showing the doctrine that a principle under the law of boundaries that governed in respect to the rivers in the state applied to the inland lakes as well.

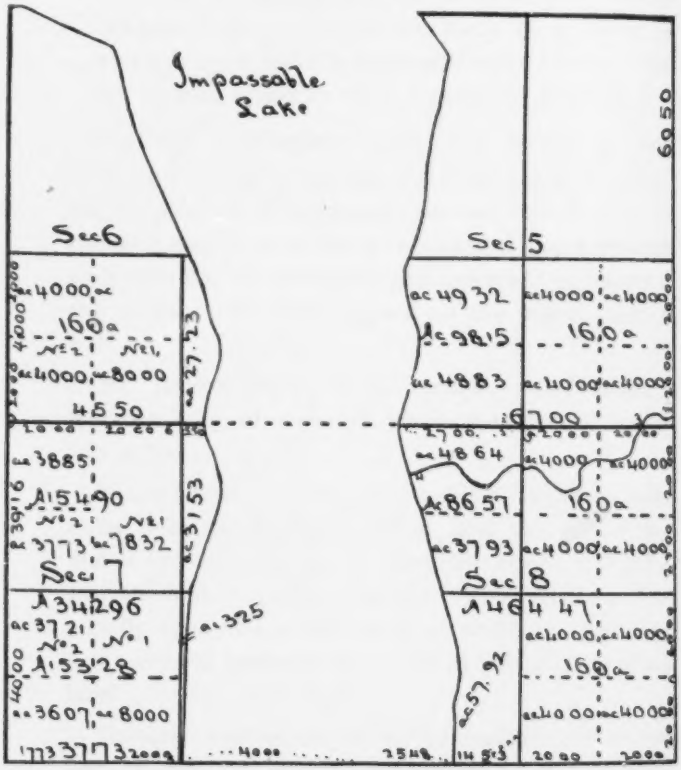
Mr. Justice Breese, in his opinion, stated distinctly that the body of water to which the decision applied was a lake.

It was found, as a fact, that it was a lake about seven miles from the Kankakee River; and the further fact that it had an outlet to the Kankakee River, still left it with the rank or quality of a lake. The decision was especially applicable to that body of water as a lake, and was a general statement of the law of Illinois as to inland lakes.

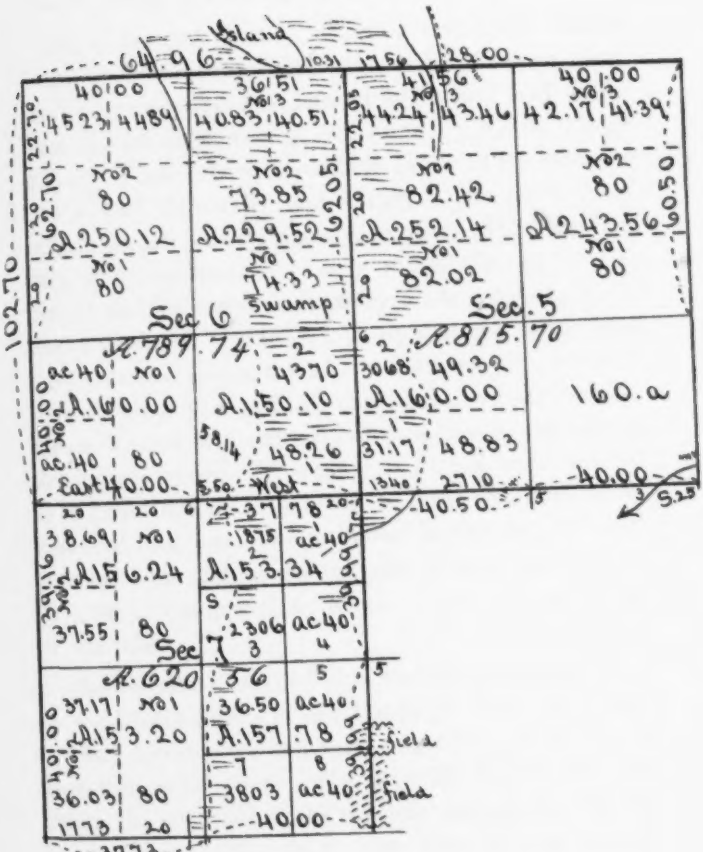
The case was not subject to the qualifications or conjectural questions which were applied to it in deciding the present case (161 Ill., 489).

Bristol v. *County of Carroll,* 95 Ill., 84, indicates, when carefully considered, that the court was not inclined to depart from the doctrine as to boundaries declared in *Beckman* v. *Kreamer, supra.*

MAP No. 12.


Impassable Lake
Sec 6
Sec 5
Sec 7
Sec 8
160a
160a
160a
160a
ac 4000
ac 8000
ac 4850
ac 3885
ac 3153
ac 3773
ac 7832
ac 3721
ac 3607
ac 8000
ac 325
ac 4932
ac 9815
ac 4883
ac 6700
ac 4864
ac 8657
ac 3793
ac 4000
ac 4447
ac 5792
ac 2548
ac 1453
ac 2000
ac 3200

MAP No. 15.


Leland
64
96
1031
1756
28.00
40.00
36.51
41.56
40.00
45.23
44.84
40.83
40.51
44.24
43.46
42.17
41.39
No 2
80
73.85
82.42
80
No 1
80
74.33
Swamp
82.02
See 6
See 5
A. 250.12
A. 229.52
A. 252.14
A. 243.56
A. 789.74
A. 815.70
ac. 40
No 1
4370
3068
49.32
A. 160.00
A. 150.10
A. 160.00
160.a
ac. 40
80
48.26
31.17
48.83
East 40.00
West
1340
2710
40.00
40.50
S. 25
38.69
No 1
1875
ac. 40
A. 156.24
A. 153.34
37.55
80
See 7
2306
ac. 40
A. 620.56
37.17
No 1
36.50
ac. 40
A. 153.20
A. 157.78
field
36.03
80
3803
ac. 40
field
1773
20
40.00
3773

The case involved the title to a part of certain lots situated within what was originally represented on the plat of the government survey of 1834 as "Impassable Lake." (Map No. 12 herein shows this survey.)

The County of Carroll, claiming under the Swamp Land Act of September 28, 1850, *supra*, brought ejectment to recover the west half of lots 1 and 2 of northwest quarter of Section 5, Township 23 North, Range 4 East. These lots were partially inside of the meander of the lake shown by that survey. The government made a second survey, namely, in July, 1850, and January, 1851, of sections 5, 6, 7 and 8 (*Ib.*, 89). The plat of the last mentioned survey made reference to "a line of meanders." (*Ib.*, 91.) By that survey the lines were extended across the lake in sections 5, 6, 7 and 8, thus, as already suggested, subdividing or sectionizing a part of what was represented as a lake in the plat of the former survey. Thereafter the lands were selected as swamp lands under said act, and the selections being approved, the lots were included in the list of lands passing to the state under the said Swamp Land Grant. (*Ib.*, 88.) (Map No. 15 herein shows the subdivision of the lake.)

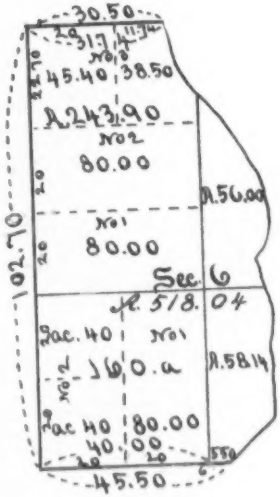
The defendant claimed title through a patent issued by the United States to one Daniel St. Ores, November 1, 1855, covering the east half of said lots 1 and 2. The case then stood thus: The plaintiff, the county, had title to the west half of the two lots, through the Swamp Land Grant. (*Ib.*, 89.) The title of the county was the earlier title in point of time, and the court held that while "a deed bounded on a highway, *prima facie*, carries the title of the grantee to the center of the road on the assumption that the grantor owns it" (*Ib.*, 91);

yet that the United States not having in fact owned the west half of said lots at the time of the issuing of the patent to St. Ores for the east half of the same lots, the claim set up by the defendants that there was *"a lake upon which their lands were bounded on the west, and whereby (wherefore) they took to the center of the lake,"* was not sustained by the evidence, as the government plat showed that when St. Ores purchased at the Land Office the east half of lots 1 and 2, the west half of said lots had been granted by the government, to wit, by the Swamp Land Grant. (*Ib.*, 91.)

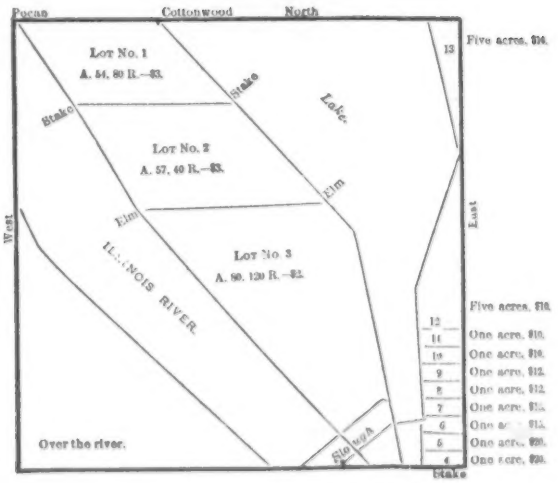
There was no attempt in the case to maintain that the lake passed to the state because of having been meandered, nor was there any intimation that if the land purchased by St. Ores from the government had at the time of his purchase been shown on the plat as being bounded by a lake, unsubdivided by the government, and remaining unsold or unaffected by the Swamp Land Grant, the claim of extension to the center of the lake would have been denied by the court.

It seems that there were meanders of the lake by the government surveyors at different times, in some of the earlier of which the lake was represented to be larger than under the later ones, and lands were brought into market as government lands which were within lake limits under meanders which had been previously adopted or approved. (Map No. 14 herein shows one of such surveys.) In no instance was the meander considered as a concession or relinquishment of title by the United States. The case shows also that if the doctrine that the title passed to the State of Illinois by the surveyor's meander be maintained, there would be a part of the lake which would be public, but other parts which

MAP No. 14.


30.50
2.0
31.7
11.3
45.40
38.50
A.24
31.90
80.00
A.56.00
80.00
See 6
A. 518.04
Sec. 40
160.a
A.58.14
Sec 40
80.00
40.00
45.50
102.70
Inaccessible Lake.

MAP No. 11.


Pecan
Cottonwood
North
Lot No. 1
A. 54, 80 R.—83.
Stake
Stake
Lake.
13
Five acres, $10.
Lot No. 2
A. 57, 40 R.—83.
Elm
Elm
West
East
Lot No. 3
A. 80, 120 R.—82.
ILLINOIS RIVER.
Five acres, $10.
12
11
10
9
8
7
6
5
4
One acre, $10.
One acre, $10.
One acre, $12.
One acre, $12.
One acre, $15.
One acre, $15.
One acre, $20.
One acre, $20.
Over the river.
Stake
Stake

would be private, depending on the question whether the government chose, before selling border lands, to make a resurvey or to sectionize parts originally meandered. A part of the lake as meandered was in the adjoining township on the north.

That lake probably illustrates the anomalous and contradictory conditions suggested, of public and private ownership upon the same body of water, from supposed right of sovereignty because of meander as to a part, and as to another part from the state taking title through the Swamp Land Act! (See map No. 13 *ante* of part of the lake in township 24 north, range 4 east.)

This court took careful notice of *Trustees of Schools* v. *Schroll, supra,* in deciding *Hardin* v. *Jordan, supra,* and said, among other things:

> "We cannot divest ourselves of the impression that the opinion of the court in that case on the subject in hand is anomalous and opposed to the entire course of previous decisions in the state."

This court further remarked:

> "It is our judgment that the law of Illinois in this regard is the common law, and nothing else; and the opinion of the court in *Trustees of Schools* v. *Schroll,* is not in accordance with common law."

(Map No. 11 herein is a copy of the map shown in 120 Illinois Reports of the subdivision by trustees of schools of section 16.)

This court further remarked that the court in that case

> "declared that there was no proof to show that the lots conveyed bordered on the lake or stream;"

also that

> "the lots were conveyed by a plat, and that did not show that they were situated on the lake."

It was also remarked by this court that the Supreme Court of the state, without being required to do so,

> "undertook to lay down the law as to rights of grantees of lands bordering on lakes and ponds as distinguished from running streams, holding to the Massachusetts doctrine that such waters belonged to the state, and are held for the use of the public, and do not pass to the riparian proprietors."

It was rightly suggested by this court that

> "nearly all of the authorities referred to in support of this decision (last named) are decisions of the courts of Massachusetts, and of other New England states which follow their lead, the court not adverting to the fact that the law of Massachusetts stands on a peculiar colonial ordinance adopted more than two centuries ago."

It was borne in mind that:

> "The grant of public lands of the United States carries with it the common law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patents, or of a statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title." (*Ib.*, 10 Pac. Rep., 720.)

The highest authorities on the subject were consulted, including *Bristow* v. *Cormican*, L. R. (H. L.), 3 App. Cas., 641, which, as Mr. Justice Bradley remarked, received the consideration of the best legal minds of England. Not the least among such authorities was *Smith* v. *Rochester*, 92 N. Y., 463, in which, Mr. Justice Bradley remarked, Chief Justice Ruger exhibited a careful and able examination of the law on the subject.

As was partly outlined in the opinion by Mr. Justice Bradley, *supra*, it will appear that in the States of New

York, New Jersey, Ohio, Indiana, Michigan and Minnesota, the general principles of the common law as announced by this court in *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra,* are fully recognized. The following, among other cases so holding, and to be noted for thoroughness may be added to those enumerated by Mr. Justice Bradley, namely:

Gouverneur v. *Natl. Ice Co.,* 134 N. Y., 355; 18 Law. Rep. An., 695.

Lamprey v. *The State,* 52 Minn., 181; 18 Law. Rep. An., 670.

Kirkpatrick v. *Yates, supra,* 45 Mo. App., 335.

Grand Rapids Ice Co. v. *S. Grand Rapids Ice Co.,* 102 Mich., 227; S. C., 25 Law. Rep. An., 815.

Olson v. *Huntamer,* 6 S. Dak., 364.

Shell v. *Matteson,* 81 Minn., 38.

Kanouse v. *Slockbower, supra,* holds to the same principle.

While *Calumet River Ry. Co.* v. *Sheaff, supra,* is stated in the opinion therein to have been decided on the authority of the present case in the same court, yet the decree in the case followed, or was based upon, the decision of this court in *Hardin* v. *Jordan, supra.*

The opinions in *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra,* were so thorough that they may well stand by themselves as against all adverse argument.

But it may be proper here, notwithstanding what was there said of *Trustees of Schools* v. *Schroll, supra,* to notice, if but briefly, some features of that case.

In holding that the Trustees of Schools could, under

the evidence, sustain ejectment, the court, by Mr. Justice SHOPE, declared:

> "Some part of the premises described in the declaration must form the bed of that part of Meredosia Lake within section 16;"

but he said further:

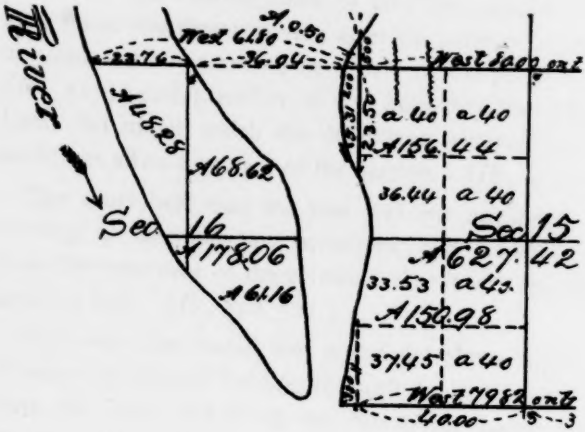
> "What part is lake bed and what shore, we cannot determine from this record." (120 Ill., 523.)

However, it was distinctly held that title to the whole of section 16, whether shore or lake bed, passed to the state under the Enabling Act, after the passage of which act said section ceased to be a part of the public lands (*Ib.*, 517); and therefore it was held that the Swamp Land Act under which the defendants claimed in part could not affect any part of the section. (*Ib.*, 517.)

The court held that the lake was not navigable, according to common law principles, and substantially, from the statement of the evidence, that it was not navigable in fact. (*Ib.*, 520, 521.)

The court also found that it did not appear that the Trustees of Schools, holding through the grant from the state the lands bordering on Meredosia Lake, made grants, to the extent they were made, of lots as being bounded by the lake. The court concluded that the defense based on the rights as riparian owners on streams to take *ad filum aquae* could not be invoked, and had no application to the case. (*Ib.*, 523.) Nor did it appear that the lots claimed by the defendants were by the plat which governed the sales by the Trustees of Schools bounded on Meredosia Lake. There was really no occasion for the court to consider whether there was any difference in the law between a stream and a lake in the matter of boundaries of land bounded thereby.

MAP No. 10.


River
West 6.80
23.76
26.94
West 80.00 ch.
A 0.50
A 48.28
A 68.62
Sec 16
A 178.06
A 61.16
a 40
a 40
A 156.44
36.44
a 40
Sec 15
A 627.42
33.53
a 40
A 150.98
37.45
a 40
West 79.82 ch.
40.00
S 3

No effort was made in the case to find what was the common law, nor was the *Beckman-Kreamer* case alluded to, nor was the cause for the New England decisions, nor for the decisions in tide water cases, recognized.

(Map No. 10 herein shows the original government survey of that part of the lake lying in sections 15 and 16.)

In observing map No. 10, we may suppose the lake to have been meandered in the public survey. This would be inferred from the fractional tracts or areas platted. Therefore, it would be pertinent to inquire what ownership applied to the different parts of the lake. Supposing that all of section 16 passed to the State of Illinois under the Enabling Act, as was held in *Trustees of Schools* v. *Schroll, supra,* did the part of section 15, which was within the lines of the lake as meandered, pass also to the state, but without any grant from the United States, and from the mere fact that the surveyor meandered the lake in a body?

According to the view or theory suggested by Mr. Justice Phillips, in the present case, the part of the lake north of section 16, and also the part in section 15 might be treated as public, or held in common for the people of the state, because the lake was meandered, while another part, namely, all lying in section 16, would be a private water, passing to the state by the Enabling Act, and subject to sale by the Trustees of Schools. Thus anomalous is the theory.

If, however, the question, how a grant of land on a lake should be construed had been a vital one in the Schroll case, or a necessary question, it would have been

expected that a collation of authorities on the subject would not have been on one side only, but, contrariwise, would have included such as followed the common law. That the court did not consider cases of the latter character seems evident from the fact that no such cases were cited.

Ordinarily, if a case is important, and presents a single question distinctly, that question will be investigated with some thoroughness; but the facts did not in the Schroll case require consideration of what was the common law as to the proprietorship of the bed of the non-navigable lake, further than to find, as the court did find, that the same passed to the State of Illinois in the given instance, under the Enabling Act.

Besides the opinion in the case, that a grant of land "bounded along and upon a natural lake or pond" would extend only "to the water's edge" (120 Ill., 519), was but argumentative. It was incidentally expressed in answer to an argument that the water to be considered was a stream adjacent to the land conveyed, while the court concluded it was a lake, though the court said it did not find (*Ib.*, 523) "that the grants, to the extent that they were made, were bounded on the lake."

The opinion was therefore not only incidental to the argument of counsel, but it was an *obiter dictum*. Hence, according to the principles laid down in *Carroll* v. *The Lessee of Carroll*, 16 How., 275 (an ejectment suit), it was not authoritative here, upon the question which was directly presented in *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra.*

The cases cited by Mr. Justice Shope to show that a different rule applies when land is conveyed as bounded

along and upon a natural lake or pond, from that which applies when the land conveyed is upon streams or bodies of water other than lakes or ponds, do not maintain the position that there is such difference, according to the common law principles.

It would not be specially profitable, perhaps, to review *in extenso* the authorities which were noted (120 Ill.) by Mr. Justice Shope in suggesting such supposed difference.

His references to Angell on Watercourses, and to a note in 3rd Kent's Com., show that in answering positions taken by the counsel of the defendants in the case, he looked to cases or references which followed the colonial ordinances of Massachusetts of 1641 and 1647. by which great ponds were withdrawn from sale and reserved for the use of the public at large, and not to cases presenting the common law principle.

The case of *Warren* v. *Chambers*, 25 Ark., 120, one of the authorities cited, recognized the right of a person buying from the United States lands situated on a lake to hold, as a part of the tract patented to him, a strip of land lying between his original upland and a meandered lake, which strip had become dry by the recession of water. While the land which had become unsubmerged was treated as an addition by dereliction, or as an alluvial formation, there was no intimation that the state acquired title to the lake bed by reason of the lake having been meandered. The court protected the patentee's title to such land.

Speaking generally, the authorities cited by Mr. Justice Shope were based on colonial ordinances, namely, on legislative enactments by a colony as to its own posses-

sions, and proceeded upon views other than common law principles as to non-navigable water.

For example, Mr. Angell, in §42 of his work on *Watercourses,* speaking of the law of boundaries in respect to lakes, cited two New Hampshire cases, a case decided by the Supreme Court of Maine, and a case decided in Vermont; and also cited *Canal Commissioners* v. *People,* 5 Wend., 423, a case involving a question whether there was private ownership of a part of the Mohawk River. From the last named case he quoted a *dictum* from Chancellor Walworth, a minority judge in the case, a *dictum* which did not apply to the facts in the case.

As to the cases so cited from Maine, New Hampshire and Vermont, it is to be remarked that this court observed in *Hardin* v. *Jordan, supra,* that the colonial ordinance of Massachusetts adopted in 1641 and amended in 1647, prohibited the towns from granting away great ponds, and

> "seemed to have been the foundation of a local common law in Massachusetts (including Maine) which led to a course of decisions with regard to the title of lakes and ponds at variance with the general common law, and which have been followed in New Hampshire and some other states."

Maine, as far as the Kennebec River, was, as is understood, annexed to Massachusetts in 1652, and in 1712 it lost its separate history in that of Massachusetts. It might therefore appropriately follow the Massachusetts ordinance.

New Hampshire was several times connected with Massachusetts up to 1679, when it became a royal province; but it renewed its connection with Massachusetts

in 1689. It was for a short time attached to New York. In 1741 it became a separate province.

Vermont was first settled about 1724 by emigrants from Massachusetts, or perhaps at Ft. Dummer by English settlers from Connecticut, under grants from New Hampshire.

Connecticut was embraced under the Charter of Massachusetts, and continued under the same jurisdiction until 1662, when a separate charter was granted.

The whole territory of Maine was subject to the colonial ordinance of 1641.

Parker v. *Cutler Mill Dam*, 20 Me., 353, 357.

At the time of the enactment of the colonial ordinances of 1641 and 1647, some great ponds and the title to some navigable bodies of water had passed into private ownership under special grants. These were not regulated. Rights under such grants were not impaired nor invaded by the ordinances, the object of which was to devote to public use the great ponds, so far as they had not been previously appropriated, or so far as they were lying in common, as appears from *Inhabitants of West Roxbury* v. *Stoddard*, 7 Allen, 158, 165. The ordinances were especially a limitation upon the "discretion of the magistrates." (*Ib.*, 166.)

When title rested in a colony, or in a state after independence, it was competent for the colony, or the state, to legislate in a manner to affect its own holdings or possessions. Each state might make grants to suit itself, reserving to itself, or for the use of the public, bodies of water, or limiting its grants as it might choose; and to a considerable extent the early cases in New England,

and some cases in New York, concerning the law of boundaries of lands granted as lying on bodies of water, depended on the terms of the grant, or had a special or local application. The interest which the grantor had in such a body of water was an element for consideration; and want of title in the grantor to the soil under such water, or in like manner a reservation by the colony or primary owner, as by the ordinances mentioned, was a material consideration.

Such cases are not to be treated as cases construing grants made by the United States.

In a large measure the grants in New England were subject to final determination by the local courts; and none of them perhaps became subject to review by this court. It was not, in such cases, as if a claim could have been made under the constitution or laws of the United States.

In *Shiveley* v. *Bowlby*, 152 U. S., 1, Mr. Justice Gray reviewed with much thoroughness the influence of the Massachusetts ordinance in that colony and in kindred communities. The learned justice traced the legislation and the judicial decisions in many states in regard to navigable waters. The case was one for the quieting of title to lands below high-water mark in the City of Astoria, Oregon, in a tidal water, a part of the Columbia River.

The court held that:

> "The title and the control of lands under tide waters are vested in the sovereign for the benefit of the whole people, and that upon the acquisition of the territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the

same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory." (*Ib.*, 57.)

While it was held that

"the title and rights of riparian or littoral proprietors in the soil below high-water mark (in such tide waters) * * * are governed by the laws of the several states, subject to the rights granted to the United States by the constitution" (*Ib.*, 58);

such has not been held to be the law as to non-navigable inland waters which were a part of the public domain.

After stating the common law as to tidal or public waters (*Ib.*, 10-14), the opinion gave a summary of the laws and course of decisions of the original states concerning such waters; and it was remarked:

"That each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

It was properly added:

"Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

Such words of caution should not have been without effect in the present case.

It was properly said by McKinstry, Justice, in *Lux* v. *Haggin*, *supra* (S. C., 10 Pac. Rep., 751):

"Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United

> States, nor to detract from the estates in such lands granted under the laws of the United States." (10 Pac. Rep., 745.)

In the opinion in *Trustees of Schools* v. *Schroll, supra,* Mr. Justice Shope cited, as indicating the law of boundaries of land on a lake, *State of Indiana* v. *Milk,* 11 Biss., 197, 11 Fed. Rep., 389. In that case Judge Gresham passed upon a demurrer to a special answer. As favoring the proposition that when land was conveyed bounded along or upon a natural lake or pond, the grant extends only to the water's edge, his Honor cited cases from New York, Maine, New Hampshire, Vermont Massachusetts and Wisconsin, and also, in the same connection, he cited the case of *Seaman* v. *Smith, supra,* an Illinois case, which Illinois case discussed the question how a private grant of land bordering on Lake Michigan should be construed as to the extent of the boundaries of the same with reference to that great body of water. But it is to be remarked that the cases cited by his Honor, Judge Gresham, were not common law cases concerning non-navigable bodies of water, and further that the reason assigned by him for limiting a grantee to low-water mark because of a supposed difficulty of division, when recognizing extension into a lake of a tract bordering thereon, was expressly disapproved by this court in *Hardin* v. *Jordan, supra,* for this court remarked:

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of common law."

In contrast with the decision by Judge Gresham just noted, and especially as showing the facts in the case, *State of Indiana* v. *Portsmouth Savings Bank,* 106 Ind., 435, should be examined.

It appears from the case that the grant to Dunn and Condit, which was at the foundation of the case presented before Judge Gresham, was especially considered. It was of subdivisions of land held by the state under the Swamp Land Grant, but it was held not to embrace adjoining tracts which had been within Beaver Lake. It was made by the state officials before the lake bed was in a condition to be sold. The lack of authority on the part of such officials to make a grant at the time that would include the lake bed was held to be equivalent to notice to Dunn and Condit that it was not included in the sale to them, and this was equivalent to an express reservation by the state of the whole lake bed at the time of the grant to Dunn and Condit.

That the case depended upon principles somewhat peculiar to the swamp lands held by the state appears from the opinion in the case by Mr. Justice Zoller, who declared it decided nothing in conflict with

Ross v. *Faust*, 54 Ind., 471;
Ridgway v. *Ludlow*, 58 Ind., 248;
Edwards v. *Ogle*, 76 Ind., 302;

some of which cases applied the common law principles of proprietorship over lands in non-navigable streams to non-navigable lakes, this being the established rule in Indiana.

The contrary views supposed to have been taken in Wisconsin and Iowa, in such cases as

Boorman v. *Sunnuchs*, 42 Wis., 233;
Diedrich v. *N. W. U. Ry. Co.*, 42 Wis., 248;
Mariner v. *Schulte*, 13 Wis., 775, and
Noyes v. *Collins*, 92 Ia., 566,

did not, in respect to a supposed difference of construction of grants of lands on lakes from that which applies to non-navigable streams, come from any recognition of the common law, but, on the contrary, from a disregard thereof, or the non-observance of the same.

It is true that Mr. Chief Justice RYAN, in the Diedrich case, *supra,* said (p. 264 of 42 Wis.):

> "When the riparian owner is seized of the soil under the water, his title is subject only to public use of the water, and to private rights of other riparian owners. When the water is not navigable, the public has no easement; and the riparian owner may, in general, *put his estate under the water to any proper use he may please, not infringing on the rights of other riparian owners, and not violating any public law.*"

But neither Wisconsin nor Iowa has been so fully or distinctly a common law state as Illinois has always been. Wisconsin became a part of the territory of Michigan in 1813, and subject to a Michigan statute at the time which repealed all English statutes, which Michigan statute is said to have been adopted by the organic act, and to have remained in force until 1849.

Coburn v. *Harvey,* 18 Wis., 156,
Webster v. *Morris,* 66 Wis., 366,

and especially a note on the subject at page 376 of 66 Wis.

These, with other cases, show that but a qualified recognition of the common law has been accorded in Wisconsin, depending somewhat upon variable legislation on the subject.

In Iowa "the common law has been neither repealed nor adopted" (6 Am. & Eng. Ency. of Law, p. 290 of 2nd Ed., note 3).

It has been recognized measurably by the courts as taking the place of the civil law once dominant in what is sometimes called the Louisiana purchase.

O'Farrell v. *Simplot*, 4 Iowa, 381.
Estes v. *Carter*, 10 Iowa 400.

The cases in Wisconsin cited by Mr. Justice Phillips are to a considerable extent distinguishable from the present case in that they treat of navigable waters, in respect to lands under which each state is permitted a sovereignty of domain that does not in the absence of a grant to the state apply to non-navigable waters.

Noyes v. *Collins, supra* (cited by Mr. Justice Phillips at page 487 of 161 Ill.), favors theoretically but unnecessarily the proposition that a grant of land bounded by a non-navigable lake should have a construction different from that which would be put upon it if the grant had been of land bounded by a stream of water.

The case was, however, one which pertained to swamp lands, and not applicable to patents from the United States for lands bordering on lakes belonging to the United States at the time of the sale of the bordering lands.

The plaintiff sued as the owner of a certain lot No. 6 in a subdivision by the County of Harrison, holding title through the Swamp Land Act. His claim was that the title to lot 6 should carry with it lot 7 in the same subdivision by the county.

The court argued or reasoned that the plaintiff did not get the title under the law of accretions. Also that, as the lake was meandered (under the government survey, it is supposed), the record failed to indicate that there

was any purpose to include in or by the conveyance of lot 6 any part of the lake bed. While, however, the court finally adopted a suggestion of the Supreme Court of Wisconsin in *Diedrich* v. *N. W. U. Ry. Co., supra,* that generally "the title of the riparian owner upon a natural lake or pond does not extend beyond the natural shore," there does not seem to have been any research to ascertain what was the common law on the subject.

Besides, the case, like that of *State of Indiana* v. *Portsmouth Savings Bank, supra,* was one in which the sale of a lot of swamp land bounded by another lot of swamp land could not reasonably be expected to include the latter. In the subdivision of it as land under the Swamp Land Act, what was called dry land, and which was found to have been drained or dried up, was in the mapping and subdivision of it by the county, subject from the first to be treated as land, independently of the fact that it had once been a lake.

In three recent cases in Iowa, those of

Schlosser v. *Cruickshank,*
Caldwell v. *Jackson,*
McNary v. *Same,* all in 96 Iowa, 414; 65 N. W. Rep., 344,

ejectment having been brought by patentees whose lands bordered a meandered lake, against persons claiming under a survey and sale by the government later than those on which plaintiffs depended, the Supreme Court of Iowa sustained the earlier patents, but refrained from determining who owned the land under the water of the lake, this being thought to be immaterial. Under the Iowa code and practice the plaintiffs could be allowed the full benefit of their action, giving them a remedy in full, as

against the defendants, without actually determining the question thus thought to be immaterial.

It would follow from the cases last mentioned that the Supreme Court of Iowa was not ready to decide that the state acquired any title to the lake bed, without any express grant from the United States.

Many of the cases, including such, for example, as *Lamprey* v. *State of Minnesota, supra* (18 L. R. A., 670), and *Gouverneur* v. *National Ice Co., supra* (18 L. R. A., 695), showed a more considerate and fuller research, and, as is submitted, a better method of reasoning than seems to have been adopted in any of the few cases wherein small inland non-navigable lakes have been treated as if they were navigable bodies of water, distinguishable in the matter of boundaries from the law of boundaries of tracts on streams or watercourses generally.

In the Gouverneur case, *supra*, BRADLEY, J., speaking for the court, said:

> "The views already given lead to the conclusion that the common law, relative to the construction and extent of grants of land bordering and bounded on such waters (a lake or pond) is applicable alike to conveyances bounding lands on fresh water rivers and small non-navigable lakes or ponds." (18 Law. Rep. An., 701; this after a full review of authorities on the subject.)

Observation will show that the weight of authority as to what is the common law is most decidedly with the view that was adopted by this court in Hardin v. *Jordan, supra, and Mitchell* v. *Smale, supra.*

X.

THE COURT HAD A RIGHT TO DETERMINE IN THOSE CASES WHAT WAS THE COMMON LAW DOCTRINE; AND THE DECISIONS OF THE SUPREME COURT OF ILLINOIS UP TO THAT TIME SUSTAINED, OR WHEN PROPERLY LIMITED TO THE QUESTION ACTUALLY OR NECESSARILY DECIDED, DID NOT CONTRAVENE, THE SUGGESTION THAT SUCH WAS THE COMMON LAW.

Even in the case of *Trustees of Schools* v. *Schroll, supra,* it was not claimed that under the common law a conveyance of land bounded by a lake that was non-navigable should have a different effect or operation from that which it would have, in respect to the matter of meander, if it had been a conveyance of land bounded by a river, that is to say, no inquiry as to what was the common law arose. There was not, to be sure, any necessity in that case for asserting a difference; but in so far as an intimation of such difference was made, it is clear that it came from answering a position of counsel that was not found to harmonize with the proofs, but was found by the court to be theoretical. The theoretical view was answered by reference to authorities or cases pertinent to other jurisdictions, and not, when properly considered, indicative of the common law.

As this court held in *Carroll* v. *Carroll,* 16 How., 275, 287, per CURTIS, J.:

> "Any opinion given here or elsewhere cannot be relied on as a binding authority unless the case called for its expression."

As was held in *Pass* v. *McRea*, 36 Miss., 148:

"Adjudications are to be considered only in connection with, and as explained by and limited to the state of circumstances appearing in the record, that is, the essential circumstances constituting the case, or that portion of the case on which a decision rests."

Thus, when the defendants in *Trustees of Schools* v. *Schroll, supra,* did not show a conveyance of land bounded by a lake, the question, what would have been the effect if the defendants had so shown, was not actually involved; and an expression on such a point was but a *dictum*, a matter of unnecessary argument. Nor is it as if authorities *pro* and *con* had been examined, and the decision had been based upon such examination. Evidently, the authorities examined were not those which applied to common law doctrine.

XI.

THIS COURT IS NOT REQUIRED IN PASSING UPON THE EFFECT OF A PATENT FOR PUBLIC LANDS TO SURRENDER ITS OWN JUDGMENT AS TO WHAT IS THE COMMON LAW.

It was within the province of this court to determine in *Hardin* v. *Jordan, supra,* and in *Mitchell* v. *Smale, supra,* what was the common law as to boundaries under a patent from the United States for land on a non-navigable body of water which had been a part of the public domain, subject to such sale under the Public Land Laws.

This was a matter which did not depend upon state statute or local state law.

The court could have declared, as was done by Mr. Justice MILLER, in *Yates* v. *Milwaukee*, 77 U. S. (10 Wall.), 497 (19 Law. Ed., 987):

> "The law which governs the case is the common law, on which this court has never acknowledged a right of the state courts to control our decisions except, perhaps, in a class of cases where state courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the state."

When this court considered the question what was the common law in the case and decided what construction should be put upon the patent in view of the fact, among other incidents, that the lake was meandered while it was a part of the public domain, it was not for the Supreme Court of the state to overrule that construction, nor was it competent for the state court to make a binding construction, limiting the rights of the patentee as to boundaries on a non-navigable lake, independently of this court. The Supreme Court of the state in this case chose to hold that the *Trustees of Schools* v. *Schroll, supra,* should be taken to be the law of the case, contrary to the view which this court had taken in respect to the same matter. But when this court found what was the common law, it but followed the lead of the Supreme Court of the state, so far as any statement of the common law, ostensibly as such, had seemingly been made by that court; and now it is not necessary for this court to recede from its decision.

Again, if it could be argued that in deciding *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra,* this court first, or in advance of a consistent or settled course of decision by the state court, decided a question arising under the common law pertaining to boundaries under a

government grant, this court should not feel bound to surrender its convictions on the subject on account of a contrary subsequent decision of the state court. For, as was remarked by Mr. Justice GRIER, speaking for the court, in *Pease* v. *Peck*, 59 U. S., 595 (15 Law. Ed., 520):

> "When the decisions of the state court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions." * * *

To a like effect is *Town of Roberts* v. *Bolles*, 101 U. S., 119 (25 Law. Ed., 884), in which case Mr. Justice Harlan delivered the opinion of the court.

In *Nelson* v. *City of Madison*, 3 Biss., 244, Hopkins, Judge, treating of a case of supposed dedication by prescription, and considering that the case presented a common law question, held that he was to be governed thereon by the decisions of this court, and not by a prior decision of the Supreme Court of Wisconsin.

In *Morgan* v. *Curtenius*, 20 How., 1 (15 Law. Ed., 823), this court found that a deed for land had by the judgment of the Circuit Court for the District of Illinois in an ejectment suit been construed according to a decision of the Supreme Court of the state, but that a later decision by that court construed it differently; and this court declined to follow such later ruling of the state court.

The question, how a grant of land bounded by a non-navigable water was to be construed, especially in the case of a grant by the United States, not having been necessary to be decided in *Trustees of Schools* v. *Schroll*, *supra*, the opinion given on that subject in that case was not authoritative here.

Gibson v. *Lyon*, 115 U. S., 439 (29 Law. Ed., 440).

Under the case just cited it would not have been conclusive here, even if it had been on a question arising upon the record in this court. It being the first case of its kind, it would not be construed as making a rule of property. It was certainly in conflict with prior decisions as to the object of a meander, and therefore it was not necessary to follow it.

Gelpcke v. *Dubuque,* 1 Wall., 175 (17 Law. Ed., 520).

Upon the question as to the common law, this court was not required to rest its judgment on the intimation given by the Supreme Court of the state in *Trustees of Schools* v. *Schroll, supra* (not, however, given as a view of the common law). But this court could, as was held in *Carroll* v. *Carroll, Lessee, supra,* decide the matter independently of the anomalous ruling of the state court.

XII.

WE HAVE HERE A QUESTION OF GENERAL LAW, SO MUCH SO THAT EVEN IF A STATE COURT HAD BY REPEATED DECISIONS LIMITED THE EFFECT OF A GOVERNMENT GRANT, THE RULE OF PROPERTY RIGHTS COULD NOT BE INVOKED, BECAUSE IT IS NOT THE PROVINCE OF A STATE COURT TO TAKE AWAY FROM A GRANTEE OF THE UNITED STATES THAT WHICH PASSED BY THE GRANT, AND CLAIM IT FOR THE STATE, THAT IS TO SAY, THE STATE COURT IS NOT THE ULTIMATE ARBITER.

When a state court holds that a state has title to the bed of a non-navigable lake, the conclusion is subject to review here in such a case as is here presented.

Supposing it to be a common law question, how a patent for land, according to the plat of a government survey, should be construed, this court need not follow a state court when that court has changed its former ruling, nor when there is inconsistency of ruling. Nor is this court called upon to retrace its rulings as to this property and put a new and enlarged construction upon the matter of meander. For the meander was an act of a ministerial officer connected with the survey of the public lands. The effect of such act was subject to be determined by this court, which could also rightfully determine whether the surveyor's act limited the rights of a patentee.

The decisions in Illinois as to the object or effect of the meander of a body of water in the public surveys had been too numerous, before *Hardin* v. *Jordan, supra,* was decided, to doubt their purpose. They had been uniform. Hence a later decision by the state court should not be allowed to prevail. Nor should it require from this court the recalling of the decision or judgment in *Hardin* v. *Jordan, supra,* as to the property therein involved, now coming under consideration again almost as if that case and *Mitchell* v. *Smale, supra,* presented by Mr. Shedd, defendant in error herein, were again brought here for reconsideration.

While, as above suggested, each state may be allowed to determine as to navigable rivers therein, whether it will relinquish the beds thereof to private ownership, subject to the rights of navigation and the general public easement, such rivers being in some of the states public highways by Act of Congress, (Rev. Statutes, U. S., §§ 2476, 5251); yet Congress carefully marked a distinction between navigable rivers and those which are not

navigable. The latter section placed navigable rivers and waters in the former territories of Orleans and Louisiana in the same class.

Supremacy has never, however, been yielded to the state courts to determine that a state has the proprietary interest in non-navigable waters once a part of the government domain. Nor has it been left to a state to determine ultimately the effect of patents from the United States for public lands.

The state can only claim title to non-navigable bodies of water, or the submerged land therein, by express grant. It can neither claim them for itself in the absence of such grant, nor can it take from them the element of private ownership following from the law applicable thereto.

The Supreme Court of the state could not, as appears from the opinion of Mr. Justice Phillips, find title in the state, since the adjudication of the Land Office denying the claim made by the state remained binding, unless upon a direct proceeding by the state to set it aside. Nor could the court find title in the state upon a ground or principle not stated or presented when the state made claim in the Land Office. The adjudication in the Land Office, like any other adjudication, was conclusive as to any matter that might have been presented. It thoroughly denied any right on the part of the State of Illinois. It did affirm title in the United States. In this respect the adjudication left but three parties in interest, namely, the United States, the patentees under the survey of 1834-5 and the claimants under the survey of 1874. The state was eliminated as a party. The County of Cook was also eliminated as a party, as was also the Illinois Central Railroad Company.

As was remarked by Mr. Justice Field, in the opinion of the court in *Packer* v. *Bird, supra,* the term "navigable" in its application to waters in the United States has been enlarged beyond the common law distinction. But how enlarged? It has been applied to the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide.

It is a general rule that the title to the soil under navigable waters within the territorial limits of a state is *prima facie* in the state, and that the title to the soil under innavigable waters is *prima facie* in the riparian owners.

(18 Am. & Eng. Ency. of Law, 2nd Ed., p. 130.)

But this court has not left it to the states to determine that non-navigable waters shall, in the construction of patents for lands platted and sold by the government, be classed with those which are navigable in law or in fact. Nor does it properly lie with a state to determine the ownership of the soil in non-navigable waters, and treat such waters as being granted to the state because of the act of a deputy surveyor in running a meander line, or because of any mistake of a public officer in designating as navigable a body of water that is not so in point of fact.

XIII.

THAT THE LAKE REMAINED A PART OF THE PUBLIC DOMAIN AFTER THE MEANDER THEREOF IN 1834-5 CANNOT BE DOUBTED.

A test in this respect might appear in different forms. Take, for example, a case in which a meandered lake, not at first sectionized or subdivided, has in time been so

sectionized and subdivided. Instances of this sort have not been uncommon. Of course, as the object of meandering has generally been understood, that might be done while the bordering lands platted and held for sale by the government remained unsold. In such cases the government might have sold the lands within the former lake bed separately from the lands adjoining the lake as formerly meandered, or might have sold any part of the lands sectionized, whether in the lake or not.

Hodges v. *Williams,* 95 N. C., 331, was a case in which the state had sectionized and sold certain lake bed lands first, and before selling the lands bordering on the lake. Having ceased to be proprietor of the lake, it was held that the state could not grant to a subsequent patentee of the lands which approached the lake an interest in the lands (lake) previously sold. That was a case in which the grant by the state would be presumed to be of land alone, without water being named or referred to through the plat as a boundary.

Examples or tests could be found under the Swamp Land Grant. The states took lake beds, that is to say, they took under those grants the lands within meander lines in meandered lakes, by virtue of the Swamp Land Act. This was so in *Bristol* v. *County of Carroll, supra.*

So in *Kean* v. *Roby,* 145 Ind., 221. The State of Indiana took under the Swamp Land Act the part of Wolf Lake (the lake here in question), which was involved in the case. That part, as well as the part in Illinois, had been meandered, and it became private property by grant from the state, as appears from the report; but it first became the property of the state, not in its sovereign capacity, but under the Swamp Land Act. The part

of the lake so involved was a large part of the Indiana portion of the lake. In that portion of the lake (see plat in the report) was the arm called Wolf River, reaching out almost to Lake Michigan, which arm, according to the evidence in this case, was used at times in opening the bar at Lake Michigan to reduce the water in Wolf Lake.

The record in *Kean* v. *Roby, supra,* was brought to this court for review, but the case was dismissed under the tenth rule. (178 U. S., 615.)

Kean v. *Calumet Canal and Improvement Co.,* No. 47 at the present term, relates also to a part of Wolf Lake.

The whole Indiana portion of Wolf Lake became and is private property through the Swamp Land Grant.

Why, when a grantee holding indirectly from the United States under the Swamp Land Act is allowed to hold the submerged portions of Wolf Lake in Indiana, as private property, should grantees from the United States having the patent title to the lands in Illinois bordering upon shallower parts of the lake be denied like rights? Is there a just reason for making this difference? Is it proper to deny the Illinois owner the usual common law rights?

Under the usual construction of the patents in such cases, the United States being the proprietor making the grants, and not reserving any part of the lake in granting the bordering lands, the lake represented in the plat would, as an entirety, be a boundary and the interest of the United States in the lake bed would, in due proportions, pass to the patentees of such bordering lands.

Undoubtedly the lake bed land involved in *State of Indiana* v. *Portsmouth Savings Bank, supra,* stood in the category of being a part of a meandered lake when the Swamp Land Act took effect.

In the opinion in this case by Mr. Justice PHILLIPS (p. 490 of 161 Ill.), it is said:

> "Prior to 1850 there were many lakes similar to those in this record referred to in many of the states, which induced the passage of the Swamp Land Act, with the amendments."

The policy of the state then was, and continued to be, to drain the marshes and the shallow lakes, and bring the soil under cultivation.

It is believed that the state did not in any instance claim any such lake because of the same having been meandered. The evidence in this record, contained in a decision by the Commissioner of the General Land Office (Record, 91), shows that the state claimed title to the lake bed lands as surveyed in 1874, and through the state the County of Cook claimed under the Swamp Land Grant, but neither asserted that the meander was equivalent to a grant by the United States, or amounted to a concession by the United States.

The claim made by the state was not one of ownership as an attribute of sovereignty, but it was one of direct grant by the Swamp Land Act; and this claim in its own terms recognized that there had been proprietorship in the United States, subject to be transferred only by direct grant.

Again, lakes were not meandered because of any special rule, or under any statutory direction. The meander was never for the purpose of signifying that any special interest was thereby given to the state, nor was it ever intended by such meander to diminish in any way the rights of the United States.

XIV.

HOW ARE THE LAKES OR PONDS, THE BED UNDER WHICH IS HELD BY PRIVATE PROPRIETORSHIP, TO BE APPORTIONED AMONG THE SEVERAL PROPRIETORS WHOSE UPLAND ORIGINALLY BORDERED ON THE SAME?

A suggestion by way of argument *ab inconvenienti*, in reference to going to the center, was advanced by Judge Gresham in *State of Indiana* v. *Milk*, *supra*. Such suggestion, though opposed to what has been settled as the law in Indiana, as well as in nearly all of the states in which the subject has been considered, doubtless had persuasive influence upon the opinion of the court by Mr. Justice Shope in *Trustees of Schools* v. *Schroll*, *supra*, and again, and perhaps even more forcibly, upon the opinion of the court by Mr. Justice Phillips in the present case.

But this court said, in *Hardin* v. *Jordan*, *supra*:

> "We do not think that this argument *ab inconvenienti* is sufficient to justify an abandonment of the rules of the common law."

Special consideration of what has actually been done under the common law rules can hardly be said to have been given by those of the learned judges who had the *Milk* and *Schroll* cases before them; for neither as to the general law on the subject, nor as to the actual methods of apportionment or division do the common law cases seem to have been brought to the notice of the judges, though it is possible that it was assumed in any remarks at the bar that the matter would be understood without producing authorities.

Upon examination of the subject, it will be found that there is not so much difficulty in making a division or apportionment as occurs in the case of incurved shores of large rivers, or in the division of flats on coves and bays, or on the seashore and the borders of the Great Lakes; nor anything like the inconvenience that happens when a close watch must be kept to see whether there is a small accretion, and to what tract it first connects itself.

In the opinion by Mr. Justice Phillips (Record, 466) it seems to have been supposed that there would be impossibility of establishing a reasonable rule for apportioning lake beds "in the absence of legislation determining" how it should be done. Why should there be legislation by the state?

The suggestion in *Hardin* v. *Jordan, supra,* that "just and equitable rules have been adopted for settling the mutual rights of parties in such cases," seems to have been overlooked, as was, also, the suggestion that

> "the supposed difficulty or inconvenience in applying the law * * * is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms or flats lying in front of their riparian lands."

Could it have been supposed in the opinion by Mr. Justice Phillips that the General Assembly of the State of Illinois could determine by itself a policy for the general government, determinative of or controlling the rights of purchasers of public lands bordering on the non-navigable lakes and waters? Nothing in the policy of Illinois could control in respect to such rights. The state did not stand in its relations toward non-navigable bodies

of water as did the grantees of the crown in the New England colonies prior to the adoption of the colonial ordinances, or while the great ponds had but few of them been alienated; and this fact seems not to have been appreciated in the opinion of the Supreme Court of the state on this subject.

In another part of the opinion (Record, 474), it was remarked by Mr. Justice Phillips that there would, if the views of this court were sanctioned, be "the injustice of holding that the purchaser of a small rim of the lake, consisting of a few acres, would at once become the owner of thousands of acres of a non-navigable lake;" and this idea, it was supposed, had "caused many courts to hold the riparian proprietor takes only to the water's edge."

But if such inequality were possible, yet it was not and is not more likely in following the common law rules than in giving accretions finally, though with much less certainty of fairness in the case of lakes, nor could such supposed inequality as a difference between lakes and rivers be exemplified by reference to the present case.

There is not in this regard a disproportion or inequality in the case of lakes as compared with rivers. For example, in *Houck* v. *Yates, supra,* the title of what had become an island of 600 acres was in effect adjudicated as belonging to the patentee of two fractions on the shore having less shore frontage than the tracts of plaintiff in error Hardin in this case, and besides the island, other land, both unsubmerged and submerged, was found to belong to the fractions patented, although those fractions were probably in themselves larger in area of

original upland than would have appeared from the plat of the government survey. In that case the government could have had the island surveyed as its own in the first instance, if it had formed before sale of the land on the river border, just as in this case it might have sectionized the whole or any part of the lake if it had chosen so to do in preparing for sales to settlers or other purchasers. But it did not choose to adopt a policy so parsimonious and so unlikely to promote settlement and the reclamation of swamps.

In *Fuller* v. *Dauphin, supra,* the land involved in the action was an island for which the plaintiff claimed title under the Swamp Land Act. The defendant showed government title to the land bordering on the water in front of the island, and his title to the island was held to be good, although he did not pay for the island as an area of land; the court adhering to its previous decisions that a meander line is not a boundary line.

It is to be noted here that in the opinion by Mr. Justice Phillips he favored the same construction in the case of lakes of any size, irrespective of the fact of their being non-navigable, so holding under *Trustees of Schools* v. *Schroll, supra.* (Record, 474, 480-1.) He announced with definiteness that the suggestion of that case was to be applied to lakes meandered, "regardless of the question whether or not they were navigable."

The injustice of depriving the patentee of small tracts upon non-navigable lakes of the incident of ownership of a separate portion of the submerged land under the water (such lakes being often liable to evaporate or vanish, sometimes in a short period), would be as great in cases of such small lakes as it would be to withhold

from the shore proprietor under patent from United States of lands bordering upon small non-navigable streams a proprietary interest in the bed.

In *Clute* v. *Fisher*, 65 Mich., 48, followed substantially by *Stoner* v. *Rice*, 121 Ind., 51 (6 L. R. A., 387), it was held that the owner of a fractional subdivision of land, made so by an inland lake, owns the soil under the water of said lake which would be included within a regular congressional subdivision if its lines were fully extended. It was, however, stated at the close of the opinion in that case,

> "in case of a body of water so large that the lines of the sections, or subdivisions of sections, held by the proprietors of the lands adjoining or surrounding said lake, if extended, do not embrace the whole of said lake, then the rule of riparian ownership may be extended to the center line of said lake, in accordance with the rule laid down by Justice Campbell, in *Lincoln* v. *Davis*, 53 Mich., 390."

The Clute-Fisher case was decided in 1887; and in its suggestion of being guided by congressional subdivisions in apportioning a lake bed, it followed what was supposed to be a rule conforming to *Brown's Lessee* v. *Clements*, 3 How., 665. The last named case was, however, disapproved of and overruled in *Gazzam* v. *Lessee of Phillips*, 20 How., 372; that case holding that the Act of Congress gave larger discretion to the Surveyor General as to regulating the size of subdivisions of public lands than was supposed in *Brown* v. *Clements*, *supra*. The subject again came up before the Supreme Court of Michigan in *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.*, 102 Mich., 227; S. C., 25 L. R. A., 815; and the matter having been carefully reviewed, it was found that *Clute* v. *Fisher* needed correction in so far as it suggested adherence to a rule erro-

neously supposed to have been laid down in *Brown's Lessee* v. *Clements, supra.*

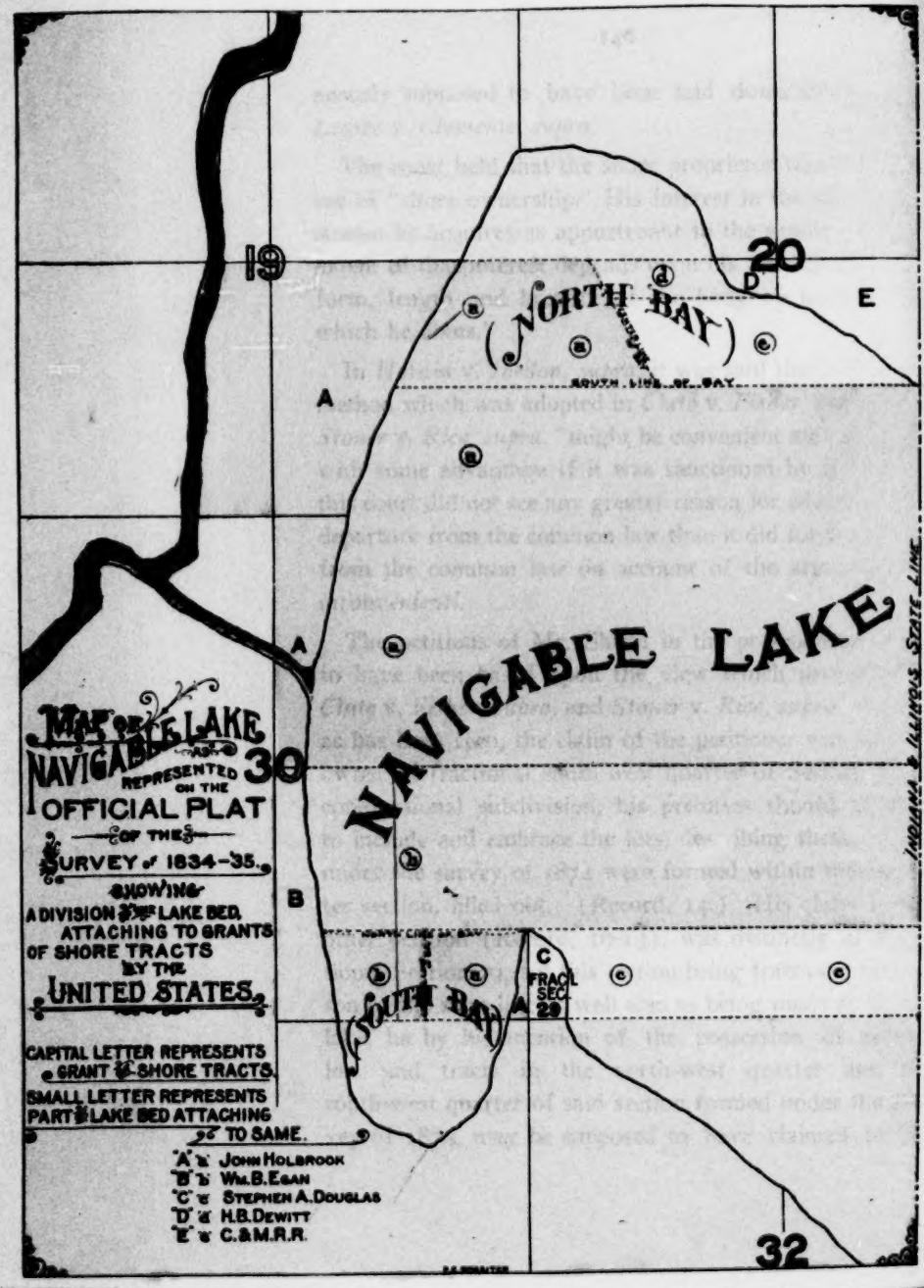
The court held that the shore proprietor takes by virtue of "shore ownership. His interest in the bed of the stream he acquires as appurtenant to the grant; and the extent of that interest depends upon his frontage and the form, length and breadth of the body of water upon which he abuts."

In *Hardin* v. *Jordan, supra,* it was said that while the method which was adopted in *Clute* v. *Fisher, supra,* and *Stoner* v. *Rice, supra,* "might be convenient and attended with some advantage if it was sanctioned by the law;" this court did not see any greater reason for adopting this departure from the common law than it did for departing from the common law on account of the argument *ab inconvenienti.*

The petitions of Mr. Shedd in the present case seem to have been based upon the view which prevailed in *Clute* v. *Fisher, supra,* and *Stoner* v. *Rice, supra.* Hence, as has been seen, the claim of the petitioner was that as owner of fractional south-west quarter of Section 20, a congressional subdivision, his premises should be held to include and embrace the lots, describing them, which under the survey of 1874 were formed within that quarter section, filled out. (Record, 14.) His claim in his other petition (Record, 10-13), was distinctly of Fractional Section 29, but this section being fractional by reason of the state line as well also as being made so by the lake, he by his mention of the possession of certain lots and tracts in the north-west quarter and the south-west quarter of said section formed under the survey of 1874, may be supposed to have claimed by in-

NAVIGABLE LAKE

MAP No. 16.


19
20
30
32
A
B
C
D
E
NORTH BAY
SOUTH BAY
NAVIGABLE LAKE
INDIANA & ILLINOIS STATE LINE
FRACL SEC. 29
MAP OF NAVIGABLE LAKE AS REPRESENTED ON THE OFFICIAL PLAT OF THE SURVEY of 1834-35. SHOWING A DIVISION OF LAKE BED, ATTACHING TO GRANTS OF SHORE TRACTS BY THE UNITED STATES.
CAPITAL LETTER REPRESENTS GRANT OF SHORE TRACTS.
SMALL LETTER REPRESENTS PART OF LAKE BED ATTACHING TO SAME.
'A' is JOHN HOLBROOK
'B' is WM. B. EGAN
'C' is STEPHEN A. DOUGLAS
'D' is H.B. DEWITT
'E' is C. & M. R.R.

ference those lots and tracts, and therefore to have proceeded upon the theory that whatever there was under both surveys in Fractional Section 29 was comprehended in the patent to Stephen A. Douglas, or a part of the tract described in that patent.

The decree which is to be reviewed herein awarded to defendant in error Shedd some land not embraced in his petitions.

The question above proposed was answered in *Hardin* v. *Jordan, supra.* The court there said:

> "Just and equitable rules have been adopted for settling the mutual rights of parties in such cases," namely, "in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms or flats lying in front of their riparian lands."

The court, in conclusion, said:

> "that the court below ought to have given judgment to the center of Wolf Lake, instead of to low water mark in front of the south-east fractional quarter of Section 19, and in front of the north-east fractional quarter of Section 30, and to the middle of the bay or projection of said lake in front of the east part of the south-east fractional quarter of said Section 30."

The Circuit Court, in pursuance of the mandate from this court, rendered a final judgment December 10, 1896, in favor of plaintiff in error Gertrude H. Hardin, in the ejectment suit which had been reviewed in this court, the terms of which judgment will be seen at pages 433-4 of the record in this case.

Map No. 16 herein, following the government plat, shows, by way of illustration, a subdivision or apportionment between the different owners. The portions in pink represent the parts for which said judgment was

rendered. The map may be used for further illustration. The portions in green, lettered (c) and (d), are parts which would go to Mr. Shedd under the principles of the decision in *Hardin* v. *Jordan;* such portions being attached to the fraction in Section 20 lettered (D), and the part in Fractional Section 29 lettered (C), respectively. The part in buff lettered (e) would be attached to the part in the same color lettered (E); and the parts in light purple lettered (b) (b) would be attached to the part in the same color west of the meander, lettered (B).

In this method of division the northern part of the lake, down to the line marked "South line of Bay," is treated as a bay and marked "North Bay." The east line of Mr. Shedd's fraction known as the south-west fractional quarter of Fractional Section 20 (Record, 58), is given the length shown in the testimony of Mr. Rossiter as to distance to lake when at 2.5 above *datum* (Record, p. 312); that divisional line (the north and south center line of Section 20) not having been run by the surveyor, he not having been expected to run lines into the interior of the section. The next fraction east, marked (E), being the south-east fractional quarter of Section 20, is given as to its east line the length stated on the government plat, being 22.69 chains, and from the south termination of that line, the line marked "south line of bay" is extended westward to the meander line.

The division line marked "center line of bay" is at a point midway between the fractions in Section 20 and the northern part of the south-east fractional quarter of Section 19.

The line marked "center line of bay" in what is shown as "South Bay" is midway between the east fraction of

the south-east fractional quarter of Section 30 and the west fraction (west of the lake), of the south-east fractional quarter of Section 30.

In respect to that part of the bed of the lake and bay attaching to the west fraction (west of lake) of the south-east fractional quarter of Section 30, shown on the map in light purple color, the record shows a conveyance by the former owners to Gertrude H. Hardin, plaintiff in error, of all that part of the same lying east of a north and south center line of the south-east quarter of the section when made full or squared out.

The part marked in light purple would in a decree herein on these principles be divided somewhat differently from the representation of this map—that is to say, differently in view of the conveyance to Mrs. Hardin above mentioned; she taking all marked in light purple except the west half of the south-east quarter of Section 30. A red line is shown on this Map 16, drawn north and south through the center of south-east quarter of Section 30, squared out, to show the part west of which the lands of Gertrude H. Hardin would not upon this record extend. Only the part in light purple east of said red line would go to Mrs. Hardin as a part of the tract acquired by her under the Egan patent.

The judgment in *Hardin* v. *Jordan* did not involve any of the land marked in purple, lettered (b), but only the land marked in pink and further designated by the use of (A) (A) (a) (a) (a) (a). The Circuit Court of Cook County, when hearing this case, after it had been remanded by the Superior Court of the state, declined to admit in evidence a transcript of the judgment just noted. This was because the court decided to take the

case upon the evidence which was heard and considered by the court in rendering the decree herein of August 10, 1892. (Record, 435.)

The transcript, however, was proper evidence, and precisely in line with the evidence which the defendant in error Shedd previously proposed in setting up and relying upon the judgment in *Mitchell* v. *Smale*. (Record, 52-55.)

XV.

THE GOVERNMENT PLAT AND FIELD NOTES SHOULD GOVERN IN THE APPORTIONMENT. THE LANDS WERE PATENTED TO JOHN HOLBROOK, WILLIAM B. EGAN, STEPHEN A. DOUGLAS AND HORATIO B. DEWITT, ACCORDING TO THE PLAT.

ALL THE PARTIES TOOK TITLE IN RESPECT TO THE LANDS BORDERING ON THE LAKE.

The plat of the survey of 1834-5 had governed the parties in this case up to the beginning of this controversy.

It corresponds with the field notes.

> "The field notes and plat of the survey of the public lands are presumed to be correct until the contrary is shown."
>
> *O'Gilvie* v. *Copeland*, 145 Ill., 98.
>
> *Town of Kane* v. *Farrelly*, 192 Ill., 521.

There is no such material variance between the plat and the evidence of topography as should cause a qualification of the plat. The evidence of topography is mainly of recent years, in which much change has come.

It is true that in the contest raised by claimants under the survey of 1874 a strong effort was made to show that there was omitted land in the original survey and platting.

At first the claimants under the survey of 1874 asserted that the meander line should be considered as a boundary. Alternatively, they argued that there was omitted land over which the meander line passed; their contention being that there was omitted land within the meander line, and especially between the south-west fractional quarter of Section 20 and Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30.

The survey of 1874 treated the lake as one, and merely sectionized it within the meander. It was not ordered upon any theory of there having been fraud or mistake in the original survey and platting, but solely on the theory that the meander line was a boundary, and that the lake bed within the meander was reserved by the United States in the sale of the lands bordering on the lake. Both these theories failed in the view of this court, and also in the view of the Supreme Court of the state; and the claimants under the survey of 1874 adopted, as a final resort, the theory that there was omitted land; which theory was also found to be unavailing to them.

The survey of 1834-5, and the plat thereof under which the bordering lands were sold by the government, have been sustained in all material particulars by this court, and by the Supreme Court of the state.

It nowhere appears that the surveyor made any mistake in setting posts at the several points mentioned in

his notes as being at the intersection of the lake. In indicating points to which his lines extended, and at which he set posts, he used words as follows: "Intersect south-easterly margin" (of lake), "south-easterly margin," "south-west bank," "south-west side," "bank of lake," "west side," "north-westerly margin," "south-western margin," "northern margin." These phrases are taken from the notes of June 17, 1834. (Record, 65-70.)

The notes of the meander of the lake under said date are shown at pages 68-70 of the record, and the notes of the resurvey of part of the meander were dated March 5, 1835. (Record, 70.)

There was much testimony as to the strip of land which in the subsidence of the waters of the lake in late years caused a separation of the lake into two bodies; the westerly body having come to be known as Hyde Lake, which, however, at the time of the hearing had so far diminished as to be divided into small, shallow ponds. (Record, 344, 363.) The testimony of the surveyors, and the maps introduced to show the elevation of the strip with reference to datum, had an incidental bearing on the question as to the extent to which it would be uncovered by the water of the lake at certain stages found at different times. It was aimed by defendant Jordan, in common with the other claimants, of the lake bed under the survey of 1874, to show that much, if not all, of the strip was omitted land in the survey of 1834-5; but the great preponderance of evidence sustained the survey and demonstrated that there was neither fraud nor mistake in the survey.

On the final hearing in the Circuit Court of Cook County the learned judge presiding therein adopted as

being equivalent to findings of fact by the Supreme Court of the state the recitals in regard to topographical matters given in the report of *Fuller* v. *Shedd*.

In that report (Record, 462), is a statement that the lands of Charles B. Shedd and of Gertrude H. Hardin were surveyed for the United States in 1834-5, and were adjacent to a lake, partly in Indiana and partly in Illinois, known as Wolf Lake, and that they were meandered on the lake.

As to the strip of land which at low water divided the lake into two parts, as before stated, the statement in the report in one place is as follows:

> "Between Fractional Section 29 and fractional south-west quarter of Section 20 owned by Shedd, as shown by the evidence, there existed at the time of the original survey a ridge which was but slightly covered with water, and at several points along this ridge islets existed, one having trees growing thereon. * * * At different seasons of the year, as early as 1841, the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages. The land on the ridge and around the margin of the lake thus above the mean level of the lake existed in 1874, at the time the circular was issued by the General Land Office for the second survey." (Record, 464.)

Later, in the opinion by Mr. Justice PHILLIPS, occurred these expressions as to the ridge:

> "From the north-east corner of the south-west quarter of Fractional Section 20, * * * there extended in a southerly direction a ridge. From the south-east corner of fractional south-east quarter of Section 30, and the south-west corner of Fractional Section 29, a ridge extended in a northerly direction. The extent to which this ridge projected from the north was about 220 rods and the extent of the

projection from the south was about 160 rods. The width of these ridges varied, at some places being twenty-eight rods wide and at others wider, and they were dry land at ordinary stages of water. At other places they were still narrower. This was the case at the time of the original survey. Along these ridges, in their projections from the north and south, trees of different varieties grew, some of which were three feet in circumference. These points, at their extremities, were about eighty or ninety rods apart, and between them, and along the sides of the ridge and around the margin of the lake within its meandered line, reeds and coarse grass grew in the water. In the marshy depressions between these points were two islands, one a mere knoll, the other containing about one or two acres, on which trees and bushes grew. This was substantially the physical condition, in ordinary stages of water, at the time of the 1834 and 1835 survey." (Record, 467.)

The opinion added:

"The level of the waters of Lake Michigan at a certain stage was adopted as a starting point of levels in Cook County. The extreme rise and fall of that lake is from five feet above datum to one foot below datum. The level of the waters of Wolf Lake, when the same reach about the meandered line of the original survey, would be about 2.2 feet above datum. Whilst in the original survey this Wolf Lake was by the field notes designated a navigable lake, it was not navigable in fact. Such being the surrounding conditions at the time of the original survey, the changes from that time to the survey of 1874 were not great, such as existed resulting from the slow filling of the lake bed, and from other natural causes. Since the survey of 1874, by reason of the improvement of the Calumet River and the wearing out of deeper natural channels from the lake and an increased flow therefrom, and the same natural causes continuing to raise the bed of the lake,

there has been a recession of the waters, causing dry land on both sides of the ridge, and around the borders of the lake." (*Ib.*)

The expressions of the opinion, when carefully considered, show that there was originally but one lake, with a shallow part, "but slightly covered with water," but with "islets," "an island" and "a mere knoll," though in time it became a ridge, or part elevated above the water level.

Such is the evidence, and only in recent years, according to the evidence, did the western part of it come to be known as Hyde Lake, the whole having for a long time been known as Wolf Lake.

The opinion by Mr. Justice Phillips in the aforesaid topographical statements probably followed to a considerable extent the findings of fact by his Honor, Judge Gresham, in *Hardin* v. *Jordan, supra,* as expressed in the report of that case in this court. Such findings are not in the present record.

The findings, as a whole, were as to conditions in 1885, which was the time of the trial, as was noted by his Honor, Judge Tuley, in the Circuit Court of Cook County in his first decision of this case. (See opinion given in the appendix hereto, page 199, *post;* the opinions of Judge Tuley being appended as per stipulation.)

Upon the pleadings, matters as to the ridge stand thus:

In the amended answer of Gertrude H. Hardin, in 443 B. R., it was said:

> "It is sometimes claimed as to the body of water shown on such plat as a lake that at the time of said original survey there was a narrow spur or promontory of land extending in a south-westerly direction from what is shown by the said plat as the southwest fractional quarter of Section 20."

In describing this spur *with reference to the time of the commencement of this suit,* the answer said it

> "extends about half way across the space shown by the plat as covered by a 'navigable lake' towards the point of land comprised of the east fraction of the south-east quarter of Section 30 and Fractional Section 29, as shown by the said plat, with the exception that about half way down the extent of said spur of land stretching from said Section 20 as aforesaid, there was an opening or space through which the water passed at ordinary stages so that at such stages of water the lower part of what at low water was a continuous spur of land or promontory would be an island, a considerable portion of which would be subject to entire submergence in times of high water. Said promontory thus extending into the water much like a dorsal fin of a fish, was extremely narrow, in some places not to exceed ten or fifteen fet in width, and in some places narrower; * * * in many places in ordinary stages of water entirely submerged, and the greater part subject to entire submergence in higher stages of water, and the whole of an area, if unsubmerged in part, or otherwise at the time of the original survey, entirely insufficient to warrant the cost of meandering and estimating its area at the price of government land at $1.25 per acre."

It was averred in the answer that with the water in Wolf Lake standing at 1.8 feet above datum, or at the average water level of Lake Michigan, "the water extends approximately to the marginal lines of said Wolf Lake at the time of the making of the original survey" as "exhibited in the plat thereof." Also, that the "true shore line of" the lake "was shown with substantial correctness upon" the government plat, and "that such was the true shore line thereof at the time of the purchase of said John Holbrook."

The pleading made reference to shallowing influences, yet maintained there was yet in fact but one lake. (Record, 27.) The statements of this answer being by reference adopted in the cross-petition of Gertrude H. Hardin (Record, 39), the answer of Mr. Shedd thereto admitted upon information and belief the allegations in the "cross-petition as to the narrow spur or promontory extending in a southerly direction from the south-west fractional quarter of Section 20, and the one extending north from Fractional Section 29." (Record, 50.)

Neither the answer of Gertrude H. Hardin nor her cross-petition spoke of any spur or promontory extending northward from Fractional Section 29, but only of "the point of land comprised of the east fraction of the south-east quarter of Section 30, and Fractional Section 29, *as shown by the said plat.*" (Record, 26.)

The shallowing of the lake, as is explained in the statement at the head of this brief, was marked after the beginning of the work by the government in deepening and improving the navigation of the Calumet River, which work began in 1869.

There was but one lake at the time of the sale of the bordering lands. Such sale began as early as June, 1836. (Record, 91-2.) The purchase by John Holbrook, the father of Mrs. Gertrude H. Hardin, was December 24, 1838. (Record, 246.)

There was no claim in the pleadings on the part of Mr. Shedd that at the time of the making of the surveys from which the government plat was made, the fractions which are the basis of his claim were larger than as is shown on the plat. Nor is the correctness of the meander questionable under the evidence. Certainly, on the

westerly and southerly border of fractional south-west quarter of Section 20, there having been a second meander (the first one having been made June 17, 1834, and the second one made March 5, 1835) (Record, 70), it would not seem to be at all probable that there was any error.

At the former of such surveys the notes closed with the statement, "land all marsh; water from six inches to three and a half feet deep."

This is to be understood as relating to the eight courses given in the re-survey as in the former survey. (Record, 70, 408.) It was so explained by Surveyor Greeley (Rec., 413), and also by Surveyor Rossiter (Rec., 338).

Mr. Greeley explained that he understood by the expression above quoted as to marsh and water, that "it relates to the land over which the surveyor passed, that is, "those nine (eight) courses in the fractional quarter (half) section." It is a "general remark about that which those courses pass through."

The government plat should be taken to be correct, and what there was of the lake as platted is subject to be apportioned among the shore proprietors, and, of course, any island or land within the lake would be included as if a part of the upland fronting the same on the lake; as in

Webber v. *Pere Marquette Broom Co.*, 62 Mich., 626.

Houck v. *Yates, supra.*

Middleton v. *Pritchard, supra.*

President, &c., of Commons v. *McClure, supra.*

Kirkpatrick v. *Yates, supra.*

Grand Rapids, &c., R. R. Co. v. *Butler,* 159 U. S., 87; (40 Law. Ed., 85).

"All islands, relicted land, and the soil of inland non-navigable rivers and streams * * * belong to the proprietors of the estates to which such rivers act as boundaries."

Schultes on Aquatic Rights, 138, quoted and approved in

Tyler on Boundaries, 94.

Admirable as was the suggestion of his Honor, Judge Gresham, in *State of Indiana* v. *Milk, supra*, that "resolute good faith should characterize the conduct of states in their dealings with individuals;" the remark should be turned towards non-intervention by the state in a case like this. Such intervention is suggested in the State Court as under a change of policy, after the state has grown so greatly under a policy consonant with the common law, and after the land has long been taxed as private property. Why should the state intervene when, if it were supposable that the meander was on the supposition of the lake being navigable, that supposition has been found to be erroneous as to every part of the lake, in Indiana as well as in Illinois?

There does not seem to be any reason why there should be hesitancy in according to purchasers from the United States of lands bordering on small non-navigable lakes the usual proprietorship over the submerged land fronting the same, as is done in respect to the land in streams. In the latter, so far as Illinois is concerned, the cases will show large bodies of land held to be a part of the shore tracts bounded by the rivers in the state. But the principle maintained is that which was suggested in *Mitchell* v. *Smale, supra*, the

"lake or stream itself, as a natural object or monument, is virtually and truly one of the calls of the

> description or boundary of the premises conveyed; and all the legal consequences of such a boundary, in the matter of riparian rights and title to land under water regularly follow."

Correct observations were made by this court in *Mitchell* v. *Smale, supra,* as to the object of running meander lines. They are run for the purpose of getting its (the land's) general contour, and of measuring the quantity to be paid for.

> "The difficulty of following the edge or margin of such projections, and all the various sinuosities of the water line, is the very occasion and cause of running the meander line, which by its exclusion and inclusion of such irregularities of contour produces an average result closely approximating to the truth as to the quantity of upland contained in the fractional lots bordering on the lake or stream. The official plat made from such survey does not show the meander line, but shows the general form of the lake deduced therefrom, and the surrounding fractional lots adjoining and bordering on the same. The patents when issued refer to this plat for identification of the lots conveyed, and are equivalent to and have the legal effect of a declaration that they extend to and are bounded by the lake or stream."

XVI.

THE RULINGS OF THIS COURT SHOULD HAVE CONTROLLED THE STATE COURT, AND SHOULD NOT HAVE BEEN DISREGARDED.

The part of the lake to be apportioned or divided in this proceeding is as represented in Map 16, *ante.* It is comprehended within spaces which are readily identified.

The direction given in *Hardin* v. *Jordan, supra,* at the close of the opinion in respect to the right of the plaintiff in that case to judgment as to south-east fractional quarter of Section 19, and north-east fractional quarter of Section 30, to the center of Wolf Lake, covers the whole space from the meander line eastward of those tracts to the line of the State of Illinois, the latter line being taken to be the center of the lake, as per Judge Tuley's first decree. (See his opinion, p. 216, *post.*)

As this court decided, the supposed narrow tongue of land which, according to the finding of facts in that case projected, at the time of the findings, into the lake from the north side, should not "*have any effect upon the decision of this case. It does not appear to have extended far enough southerly, at least, during high water to be opposed to the property of the plaintiff;*" and this court in that case approved in this respect of the decision in *Forsyth* v. *Smale,* 7 Biss., 201.

The court also said the plaintiff in *Hardin* v. *Jordan, supra,* was entitled to judgment "to the middle of the bay or projection of said lake in front of the east part of the south-east fractional quarter of said Section 30." This last mentioned matter is also readily adjusted under the decision of this court, as is shown in Map 16, *ante;* the part in pink, marked (a) being attached to said fraction marked (A); the part (b) in purple, lying east of the north and south center line of the quarter section shown by the line drawn in red passing to Mrs. Hardin derivatively, by mesne conveyances, under the Egan patent.

The principle applied to the bay last mentioned, marked on this map "South Bay," is also applicable to the

part marked "North Bay." This is to be done by attaching to the fraction owned by Mr. Shedd in south-west fractional quarter of Section 20, marked (D) the part in green marked (d). And so as to the fraction in south-east quarter of Section 20 marked on this map (E): It is to take the part marked (e) in buff, bounded on the south by the line marked "South line of Bay," which line is drawn from the south-east corner (on the lake margin) of the tract; that corner having been fixed in the government survey, first by a "temporary post" (Record, 70), and secondly by a "post," the water being there "too deep to raise a mound." (*Ib.*)

The suggestion as to the apportionment as between the tracts (D) and (E), is believed to be fairly illustrative of the method of division as between the owner of (D) and the owner of (E); though the latter tract is not directly involved in this case, except that as between plaintiff in error Gertrude H. Hardin and the owner of that tract, the principle applies that this part of her tract goes but to the center of the bay. If any question should arise between the owners of tracts (D) and (E) as to the length of their respective lines on the center line of the bay, it may be adjusted between themselves. Such question, should it arise, could not affect the rights of the plaintiffs in error, nor change the center boundary between tracts (d), (e) and (a), nor the south boundary of tract (e).

The rule of apportionment stated in *Kehr* v. *Snyder*, 114 Ill., 313, 316, is appropriate; though the process of division in that case was evidently much more complicated than in this case; for here there are but few tracts to be considered, and the area is of such form that the division is comparatively easy, with but little occasion for

convergence of lines. As stated in that case, the length of shore line or lake front of a congressional subdivision being found (the general length from corner to corner, disregarding sinuosities), a line would be drawn opposite thereto at the other extreme of the part to be apportioned, and this line would be "measured into as many equal parts as there are lineal feet in the shore line, giving to each proprietor as many of these parts as his property measured feet on the shore line." Side or division lines running into what was originally the lake would be drawn between the two corners of each tract on the shore line and the two points or corners on the opposite or measured line, thus designating the lot or parcel belonging to each proprietor.

A near approximation to the length of the line in the lake or bay, as to each tract, can be made without difficulty.

The several patents referred to the official plat of the survey of 1834-5. The field notes and plat became a component part of the description. The plat should, as between the parties to this case, have been taken to be correct. This proves that at the time of the survey there was but one lake.

The original decree of the Circuit Court of Cook County considered the propositions with reference to extension to the center of the water, mainly under *Hardin* v. *Jordan, supra,* and *Mitchell* v. *Smale, supra.* The later decree now under review, considered, under such evidence as the record previously contained, what were accretions. The chancellor's conclusion in the former instance is shown at pp. 416-424 of the record.

In decreeing to Mr. Shedd any land either north or

west of the corner on the sectional line between Sections 29 and 30, fixed in the government survey as being "*at the bank of the lake,*" there was a departure from the right principle. This was so in giving his tract an undue extension northward upon that line; and there was error in not regarding the principle of lateral extension from the shore tract in extending side lines into the lake. His bounds were first extended northwardly into the lake, so that his shore line was greatly elongated, when the evidence showed no mistake in the survey; and from this method of enlargement he was allowed to have extension of his original tract into the lake westerly as well as easterly. As an explanation to some extent, Judge Tuley, in his opinion, remarked that he found from the evidence that there was a ridge extending north in "varying widths to the north line of south-west quarter of 29 (p. 215, *post*); also that the east fraction of south-east quarter of Section 30 (Mrs. Hardin's tract) formed a part of this ridge." "How far to the north it constituted a part of the ridge" he was "uncertain from the evidence;" but he said, "I am satisfied that it did not go north of the north line of the south half of south-west quarter of Section 29;" and he said that would be fixed as its north limit." (*Ib.*, p. 215.) He had previously said "that there was some land not covered with water inside the meander line" (particularly in the south-west quarter of Section 20), "at the time of the survey of 1835; but it is impossible from the evidence to ascertain the exact quantity of such lands." Also that "the evidence failed to show that there was such an excess in quantity, over what the plat exhibits, as to show either fraud or mistake of the surveyor. (*Ib.*, p. 200.) He also said, "While the court will regard the evidence as to what land is above water as con-

trolling, yet where there is doubt, it should be resolved in favor of the shore owner to the extent at least of the lowest fraction into which the government subdivided lands." (*Ib.*, p. 215.) In another part of his opinion he said: "The Michigan and Indiana rule commends itself to my judgment" (*Ib.*, p. 213), probably supposing at the time that in Michigan as well as in Indiana it was "held that the patentee took all the lands in the fractional section, without regard to the number of acres specified in the patent." But he added that he construed the decision of this court in the *Hardin* v. *Jordan* case as in effect overruling the Michigan and Indiana rule. (*Ib.*, p. 213.) It is yet supposed that he was influenced by the Indiana decisions, in some measure.

With reference to any northward extension of Fractional Section 29, it is to be noted:

The field notes (p. 65, Record), show that the surveyor "set a post corner to Sections 29, 30, 31 and 32;" and he mentioned witness trees, at distances of 41 links, 98 links and 82 links, respectively. He added in his notes, "No tree near in Section 30." He next ran a line west, between Sections 30 and 31, 2.84 chains, where he intersected the south-easterly margin of the lake. He then sent his flagmen around the southern extremity of the lake, and "caused the flag to be set on the opposite side thereof on the line between Sections 30 and 31."

Omitting here the other calls on the westward to the south-west corner of the fractional township, his notes show (p. 66, Record), that beginning again at the corner which he had established as the corner of Sections 29, 30, 31 and 32, he ran east 5.97 chains and intersected the southwest side of the lake. The latter was the south line

of the fraction entered by Stephen A. Douglas. Beginning again at the corner of Sections 29, 30, 31 and 32, he ran north (p. 66, Record) 14.50 chains and intersected bank of lake, where he "set a post corner to Fractional Sections 29 and 30."

At the end of his notes concerning this call the surveyor said: *"As the remainder of this line is in the lake,* I commenced work at the corner of Sections 24 and 25." (*Ib.*, 66.) Fractional Section 29 had three corner posts, being all that the surveyor was required to fix, as he was only called upon to run section lines. Two of such corners, the south-east corner and the northerly corner, were at the margin of the lake; and these were two of the corners to the east fraction of the south-east fractional quarter of Section 30 (the Holbrook tract).

The two tracts were co-terminous on the north at the lake, with a common division line between them, running to the lake, while the frontage of the east fraction of the south-east fractional quarter of Section 30 is on the bay to the west thereof. A lateral extension into the lake of the fraction in Section 29 would be necessarily toward the east, while the lateral extension of the east fraction of south-east fractional quarter of Section 30, would be necessarily toward the west. It is an established principle that the line between the two tracts would be taken as co-extensive with the bounds of both of the tracts. One would be no longer north and south on that line than the other. Neither one was in fact longer on that line than was the other; and the north line of extension of each tract, one to the east and one to the west, must run from the established corner for each tract.

There is no reason for declaring in the face of the field notes and the government plat that the bay extended far-

ther north than is represented on the plat. It must necessarily follow that there is no sufficient reason for treating Fractional Section 29 as having extended as a body of land any further north than did the east fraction of the south-east fractional quarter of Section 30.

The line on the west side of Mr. Shedd's tract in Section 29 was the same as Mrs. Hardin's line on the east side of her tract, next west; not longer and not different.

According to the Act of Congress of February 11, 1805:

> "The boundary lines actually run and marked in the surveys returned by the Surveyor General, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof."

From the point of termination of the line actually run to the post set at a distance of 14.50 chains from the corner between Sections 29 and 30, the Act of Congress would require the boundary line to be ascertained by running from the established corner due north and south. This would be the division line between the two tracts as far as either might extend. Hence, it is not proper to give Fractional Section 29 any extension westward of that line; nor did the petition of Mr. Shedd claim any part of Section 30.

The meander tends to exclude the idea of extension northward of Fractional Section 29.

In running the meander, the surveyor's notes said, Starting at the corner of Fractional Sections 29 and 32, "thence from said corner * * * along south-west

margin of lake along Fractional Section 29," giving four calls of 10, 3, 4 and 0.71 chains, respectively, "to the corner of Fractional Sections 29 and 30." He added, "land —soil, third rate, very thinly timbered with yellow and burr oak." In the meander from the corner to Fractional Sections 29 and 30, along the southerly margin of lake," the notes say, "thence from said corner along the southerly margin of lake along Fractional Section 30, specifying three calls, to corner of Fractional Sections 30 and 31." He added, "land all marsh, unfit for cultivation."

Further as to topography Jordan's Exhibit 4½ (Rec., 172-3), Map No. 3, *ante*, represents the bed of the lake as shown by the government plat, north of these two fractions as being marsh at the time of the survey from which said exhibit was made, to wit: in 1883. This exhibit negatives the suggestion that Fractional Section 29 extended farther north in 1834 than is shown on the government plat. The same exhibit shows the line of a road bed extending north from the south line of Fractional Section 29, the making of which road was one of the causes of elevation of the part of territory over which the road was constructed.

As to the length northwardly of Fractional Section 29, Mr. Shedd, in testifying said: "There is some high ground on the south-west corner of Section 29. It extends, I should say, six or eight hundred feet, or more, perhaps, than that, north of it." (Rec., 73.)

Having said that this point was from the south-west corner of Section 29, the distance stated by him as to length is hardly as great as the length of the line run by the surveyor between Sections 29 and 30; such length being 14.50 chains, or 957 feet. (Record, 66.)

The marsh extended up to and beyond the "Field" house, sometimes known as the Fogli house, or "Elm Island." Water stood under that house in 1883 (Record, 373), although Field constructed the road and raised the ground by fills. (Record, 378.)

Fractional Section 29, with the east fraction of the south-east quarter of Section 30, extended north to the lake at one common corner for both tracts. The outlines of both tracts were shown on the government plat. All intervening space northward was and is to be regarded as lake, subject to the frontage rights of the several tracts on the west extended laterally into that space. This being a non-navigable lake any unsubmerged land within the lake would go to the shore owner under the patents from the United States.

"Each congressional subdivision situated on the lake" * * * "had the quality of a distinct side" in respect to frontage on the water. "Riparian rights extend laterally from the shore." (*Moore* v. *The Willamette Transportation, &c., Co.*, 7 Ore., 355.) They extend "by the side," "sidewise," "in the direction of the side." (Webster's Dictionary, defining "laterally.")

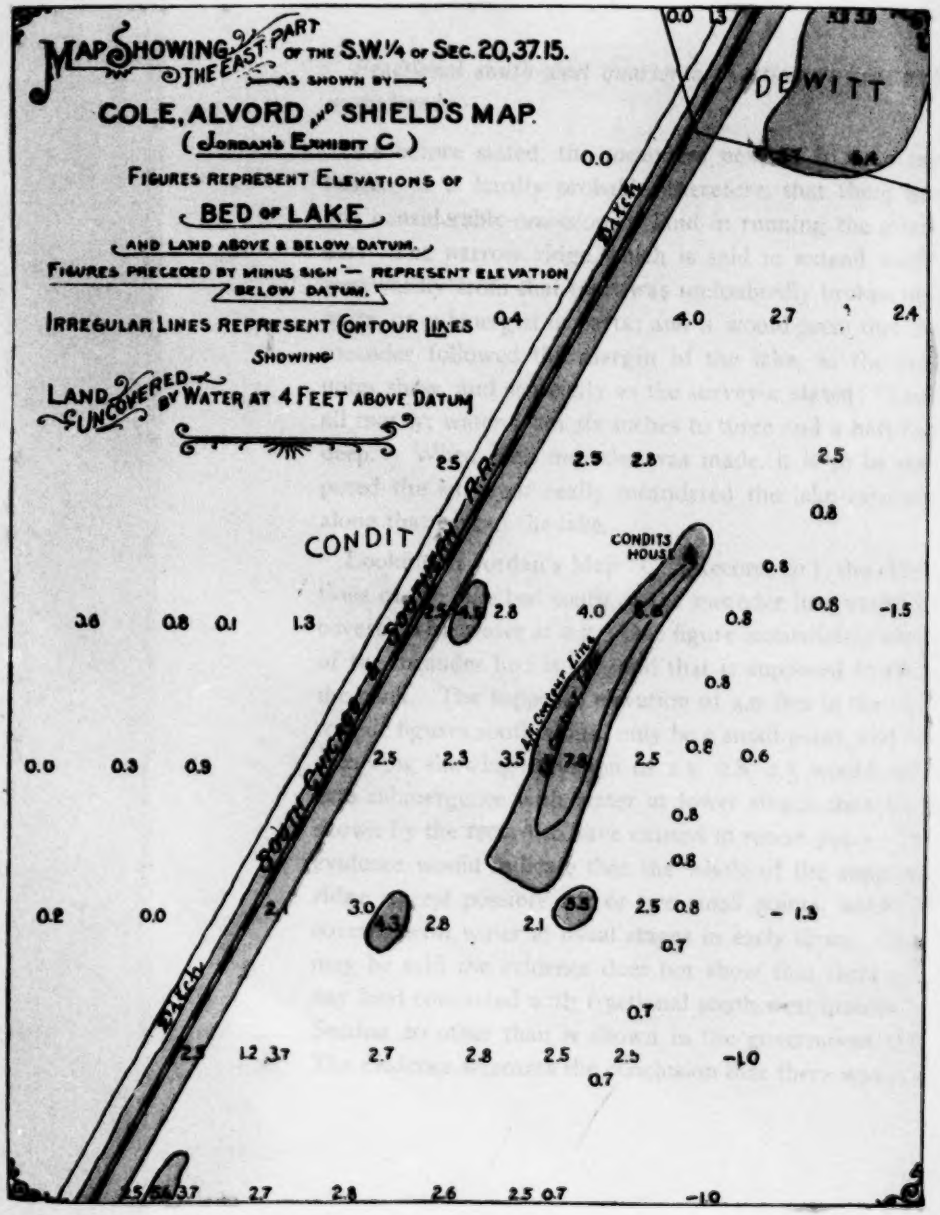
The decree departed from this principle in annexing to Fractional Section 29 certain islands (Record, 447), as passing by virtue of the patent to Stephen A. Douglas, and not under the law of accretions. In the departure there is a tacit admission that the tract did not in its original form have the extension claimed for it.

Fractional south-west quarter of Section 20 was well meandered.

As before stated, the meanders next to it were run twice. It is hardly probable, therefore, that there was any considerable omission of land in running the meander. The narrow ridge which is said to extend south-westwardly from that tract was undoubtedly broken into parts, or submerged in parts; and it would seem that the meander followed the margin of the lake, as the field notes show, and especially as the surveyor stated: "Land all marsh; water from six inches to three and a half feet deep." When each meander was made, it is to be supposed the surveyor really meandered the lake carefully along that part of the lake.

Looking at Jordan's Map "C" (Record, 91), the elevations of the lake bed south of the meander line would be covered with water at 2.7. One figure immediately south of the meander line is 5.7, and that is supposed to be at the bank. The supposed elevation of 4.0 feet in the next row of figures south would only be a small point, and the next row showing elevation of 2.5, 2.8, 2.5 would indicate submergence with water at lower stages than were shown by the record to have existed in recent years. The evidence would indicate that the whole of the supposed ridge, except possibly one or two small points, would be covered with water at usual stages in early times. So it may be said the evidence does not show that there was any land connected with fractional south-west quarter of Section 20 other than is shown in the government plat. The evidence warrants the conclusion that there was not.

MAP No. 9.


MAP SHOWING THE EAST PART OF THE S.W.¼ OF SEC. 20, 37. 15.
AS SHOWN BY
COLE, ALVORD AND SHIELD'S MAP.
(JORDAN'S EXHIBIT C)
FIGURES REPRESENT ELEVATIONS OF
BED OF LAKE
AND LAND ABOVE & BELOW DATUM.
FIGURES PRECEDED BY MINUS SIGN — REPRESENT ELEVATION BELOW DATUM.
IRREGULAR LINES REPRESENT CONTOUR LINES
SHOWING
LAND UNCOVERED BY WATER AT 4 FEET ABOVE DATUM
DEWITT
CONDIT
CONDITS HOUSE
SOUTH CHICAGO & SOUTHERN R.R.
Beach
Beach
4 Ft Contour Line
0.0
0.4
4.0
2.7
2.4
2.5
2.8
2.5
0.8
0.8
0.8
-1.5
3.6
0.8
0.1
1.3
2.5
2.8
4.0
0.8
0.8
0.0
0.3
0.9
2.5
2.3
3.5
2.5
0.8
0.6
0.8
0.8
0.2
0.0
2.1
3.0
2.8
2.1
2.5
0.8
-1.3
0.7
0.7
2.5
1.2
3.7
2.7
2.8
2.5
2.5
-1.0
0.7
2.5
3.7
2.7
2.8
2.6
2.5
0.7
-1.0

Map No. 9 herein shows any land that would be uncovered with water at 4 feet above datum, a stage of water less than was observed by Mr. Shedd (Record, 404), and by his business associate, Mr. John S. Field. (Record, 3[illegible].)

Map No. 4, *ante* (Record, 267), shows elevations of water found when surveying the line for the South Chicago and Southern Railroad; at some stages during which survey Mr. Craig, the engineer in charge of the work, said there was left but little land within the meander, though he added, *"Now and then you could see a little of the ridge peeking out."* (Rec., 279.) The table of elevations (Rec., 322) prepared by Surveyor Rossiter, which elevations were observed by him when performing functions mostly disconnected with the present case, shows stages sufficient to separate and cover the ridge largely, especially within and near the meander in south-west fractional quarter of Section 20, as well, also, as north of Fractional Section 29; elevations of the ridge shown by Map "C" being generally less than the stages noted by Mr. Rossiter. Of course any submerged land south of fractional south-west quarter of Section 20 would be regarded as a part of the lake in extending side lines laterally from the shore tracts. Such submerged land would not, if it afterwards became unsubmerged, interrupt the extension of the side lines into the lake proportionate to the shore lines as exemplified in Map 16 *ante*. Nor would unsubmerged areas, islands or islets, interrupt such extension of side lines.

If it be said that the south-west fractional quarter of Section 20 should be found to have a shore corner farther south than is supposed in Map 16, *ante*, such corner being as far as the meander, it would, of course, be incumbent upon the owner of that tract to show that the land ex-

tended farther into the lake than as shown on the government plat. This gives rise to the question whether there was really such extension into the lake when the original survey was made; for all the parties bought according to the plat of such survey.

In looking at Jordan's Map "C" (Record, 90, 91), a narrow strip, in light brown color, appears at the meander line which was run in front of fractional south-west quarter of Section 20. Two elevations are shown, one of 6.4 feet north of the line, and the other 5.7 feet south of the line. The elevations as shown were found in 1886-1890, not 1834 nor 1835; and the water line may have been high enough in the earlier period to cover the space adjacent to or next south of such elevations. The land may have been much lower south of the meander line, as the next figures south are 4 feet and 2.7 feet, elevations likely to be submerged at medium stages of water at the time of the survey. The meander crossed lower elevations of the lake bed before reaching the north and south center line of Section 20.

Shedd's Exhibit, Jordan's Map "C," purporting to represent surveys from 1886 to 1890, is subject to much criticism. The colors to represent topography in contour lines for each foot of elevation do not correspond with the figures thereon. The contradictions are so numerous and the contour colors and figures are so conflicting, that the map has no value as a contour map. It is highly deceptive and misleading. The light blue is said to represent water at datum; the figures in the light blue ground showing the depression of the bed below datum. The map is but theoretical. It was constructed from different surveys, covering much lapse of time. It does not represent the water as it actually stood at any sur-

vey; much of the land being covered with water at such times. (Record, 185.) Inspection of the map will disclose conflict between the so-called contour lines and the elevations stated in fractions or in feet. Instances of such conflict could be pointed out. For example, there are figures, 1.5 (meaning below datum) east of the "Condit House," which figures are within the belt representing, according to the coloring and contour lines, area one foot above datum. In the same belt east of the name "McDaid" 1.4; south of the cut south of "Field's House" 1.2, 1.3, 1.3.

From the top of the map southward in the next belt of two feet above datum are numerous higher figures, some being 3.0, 4.0, 4.7, 3.0, 4.0. The contradiction extends throughout the entire map. In fractional Section 29 and east fraction of south-east quarter of Section 30, there is so much confusion as to baffle understanding. Similar confusion exists in south-west fractional quarter of Section 20.

Mr. Shields, under whose supervision the map was constructed, said, when his attention was called to the elevations shown on the map south of the meander in south-west quarter of Section 20 as 2.7, 3.0, 2.1, that the stage of water noticed by him (it being 3½ above datum) would overflow all elevations below that figure. (Record, 198-9.) The map does not show the road constructed by Solomon Field, which was raised by filling north and south through the strip shown as separating the lake into two bodies. The elevations shown north of the point comprising Fractional Section 29 and the east fraction of the south-east fractional quarter of Section 30, being 4.0, 4.7, may be considered as being on the road, the elevations on each side of those given being much lower.

As to the conditions south of the shore line of the lake in front of the fractional south-west quarter of Section 20.

Mr. Shedd, the defendant in error, testified that south of the name "Condit" on Map "C" (Record, 91), the lightest colored portion would represent the highest portion of the ridge which in most ordinary stages of water is dry. At the termination of the ridge shown on the Map "C" a short distance south of the Condit house, he said there was a natural depression in which he had seen the water stand, the ground being wet and swampy. Further south he said there is more high ground, where the name "McDaid" appears. (Record, 72-3.)

Mr. Shedd further said:

> "In extreme high water I think that about all that ridge would be covered with water. I have seen water there so high that I think very little of it would show out of the water. I didn't go on it at that time. I don't think it would have been possible to get there except by boat, but in ordinary stages of high water I should say that the whitest portion, as indicated on the map, was probably above water."

The whitest portion referred to by Mr. Shedd is the narrow strip south of the Condit house, where the elevations are given, 8.1, 8.6 and 7.8, the small area south and west of the name "McDaid," where the elevation of 5.0 appears, and the small narrow strip extending north from the south line of Fractional Section 29, the elevations there shown being 6.9, 5.3, 5.7, 7.7, 7.4.

Mr. Shedd introduced divers witnesses to show the depression south of the name "Condit," and the marshy conditions existing there. This observation includes the

testimony of Mr. Rossiter, called by Mr. Shedd (Record, 369), John S. Field (Record, 367), Joseph M. Spahn (Record, 385).

Mr. Shedd's Exhibit, Map "C," shows this break or depression.

The area south of the break, and where the name "McDaid" appears, is known in the record as "Crescent-Shaped Island." (Record, 286.)

Mr. Shedd introduced witnesses by whom it was shown that the lake often covered the marsh space south, and also north, of Elm Island, the crossing of the same being made by boat. (Record, 373-80, 360-1, 390-1, 397-8, 403-4), and other witnesses testified as to water covering this space. (Record, 352-6, 357-8, 345, 288-9.)

For reasons of doubt, such as were advanced by the chancellor, as to the amount of land unsubmerged at the time of the survey, neither of the fractions of Mr. Shedd should be enlarged at the expense of other tracts, and to the exclusion of those from extension to the center of the lake.

The question of extension was to be resolved by the conditions existing at the time of the survey. Such survey became a fixed fact, and the only question to be determined thereunder is, Was there any land which can be claimed as having been embraced within the survey, and which is attachable to any particular tract as having been an actual part thereof at the time of the survey? Elm island, when it became such, lay entirely outside of Fractional Section 29 and its extension east to the center of the lake. Equally when unsubmerged as when submerged it was within the lines of extension, or regular side lines, of the west fraction (west of lake) of the

south-east quarter of Section 30, and the north-east fractional quarter of Section 30. The highest elevation upon the island being 4.2 above datum, it was undoubtedly, from the evidence of the elevation of the water as disclosed by the field notes, submerged in 1834; and the record discloses frequent submergence in recent years.

The recognition by the surveyor of the point comprising Fractional Section 29 and the east fraction of the south-east quarter of Section 30, extending into the lake, is fairly illustrative of the faithfulness of the survey. Like observation will apply to south-west fractional quarter of Section 20, where it appears that the surveyor deflected his course in running the meander, thus noticing the small elevated area comprising that fraction.

Map No. 8, shown herein, represents the division of supposed accretions under the decree of August 11, 1897, which was affirmed by the Supreme Court of the state, and is herein challenged.

The strip awarded to the Cook County Canal and Dock Company was 400 feet in width north and south, immediately north of the south line of south-east fractional quarter of Section nineteen (19), and extending across that quarter section, and far enough east to reach the waters of Hyde Lake. The strip is not separately shown on this map.

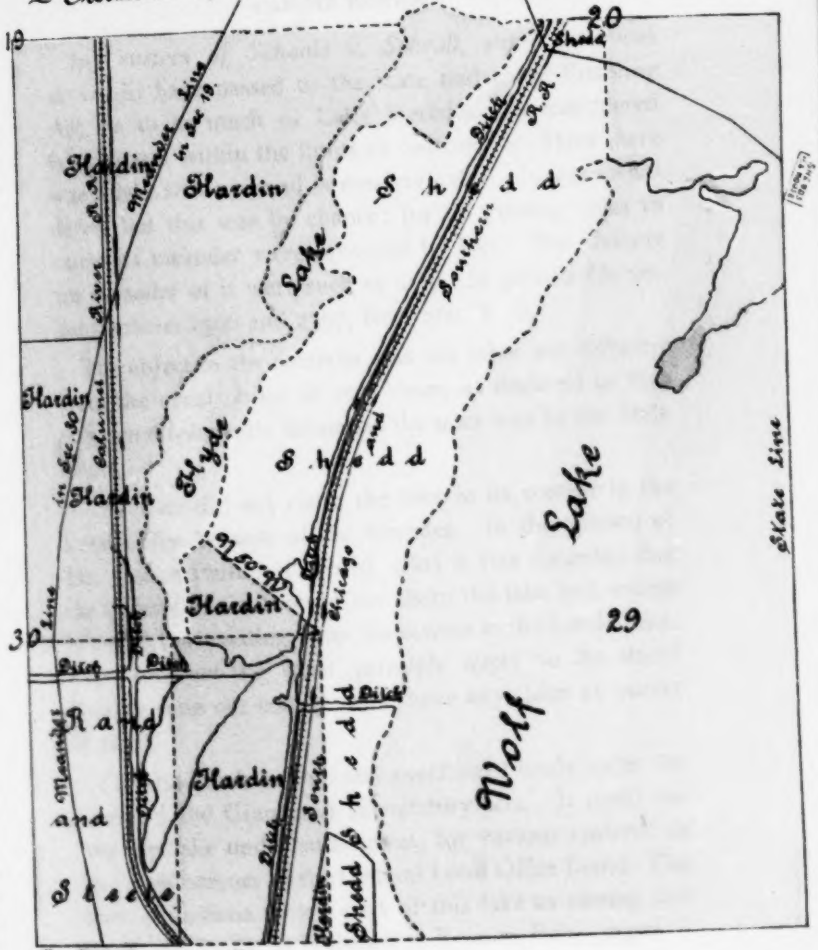
The representation of Hyde Lake did not correspond with the time of the said decree. Evidence to show a drying up of Hyde Lake since the former hearing was offered. (Record, 432, 484-5.)

MAP No. 8.

Map

showing divisional lines under decree of Aug. 11th 1897.
applied to Jordan's Map D. supposed to represent
Hyde Lake as of Sept. 26th 1891.

~ Elevation of water 0.37 ft. above datum:


19
20
Hardin
Hardin
Shedd
Lake
Hyde
Lake
29
Wolf
Shedd
Hardin
Hardin
Hardin
Hardin
Hardin
Shedd
Shedd
Shedd

XVII.

NO TITLE IN THE STATE TO THIS NON-NAVIGABLE LAKE CAN BE SHOWN.

In *Trustees of Schools* v. *Schroll, supra,* title was shown to have passed to the state under the Enabling Act, as to so much of Lake Meredosia, a meandered lake, as was within the limits of Section 16. Here there was a lake that was and is non-navigable. It was meandered, but this was by chance; for no guiding rules to cause its meander were provided by law. The chances for meander of it were such as might be permissible under Sections 2396 and 2397, Rev. Stat. U. S.

The object of the meander was not other nor different from the usual object in such cases, as declared by this court, and frequently defined in the same way by the State Court.

The state did not claim the lake in its contest in the Land Office because of the meander. In the opinion of Mr. Justice Phillips (Record, 480) it was conceded that the County of Cook could not claim the lake bed, except in a direct proceeding, after the contest in the Land Office. Why does not the same principle apply to the state? Neither state nor county could have any claim as matter of right.

The state took swamp and overflowed lands under the Swamp Land Grant and amendatory acts. It could not take this lake under such grant, for various reasons, as the Commissioner of the General Land Office found. The State of Indiana took a part of this lake as swamp and overflowed lands, as is shown in *Kean* v. *Roby, supra.*

Patents for the land bordering on the Illinois portion of the lake were duly issued by the United States. The effect of those was to give the shore owners each a distinct interest in the bed of the lake, corresponding with the shore fronts in relative proportions according to the common law. This court ascertained and declared the law of the case. The Supreme Court of the state should have recognized the right of this court to declare the effect of the patents. Good faith on the part of the state in making a present claim for the lake could not be shown, especially after the action taken under the Swamp Land Act, the contest in the Land Office and before the Commissioner of the General Land Office, and the taxing of the property by the state.

This court rightly determined for itself what was the common law. It need not be driven from its position on the subject by anomalous and inconsistent rulings, the later of which do not accord with other decisions as to the object of a meander in surveying.

Many considerations entitle the plaintiffs in error to a decree holding their tracts to extend to the center of the lake and bay, respectively.

There having been in the first instance but one lake, and all having bought according to the plat, there is no right nor occasion for treating the property as having been on a minor body of water, because it has become detached in the course of time.

Nor does the policy of the state, as shown in the Acts of the General Assembly concerning Fish, require any modification of the common law.

Mr. Justice Phillips, in the opinion (161 Ill., 489) (Record, 478), said: "The policy of the state in recent

years has been to stock its waters, both lakes and streams, with fish." As to this the legislation of the state did show provision for a Board of Fish Commissioners, to be appointed under the Act of 1879, with authority "to select suitable locations for state fish hatching and breeding establishments;" and the Act gave authority to the commission to take measures "for the introduction of new varieties of food fishes into the public waters of the state;" but this did not entitle the state nor the commissioners to take private property. The more extensive acts of 1897 and 1899 are but an exercise of the police power. They do not derive any force from a claim of this lake on the part of the state, and there is nothing in the record to show that it is suitable for fish hatching or breeding. Its vanishing proportions, and its likeness to a swamp in any part which still has water in ponds, except as a part is artificially sustained by Mr. Shedd and other ice men for the cutting of ice, indicate that it would be a very poor place for fish.

The paternalism seemingly favored in the opinion by Mr. Justice Phillips, in diminution of the rights of shore proprietors who had to contend so much to protect themselves against the claimants under the survey of 1874, had not budded when the contest was heard in the Land Office; and it has scarcely budded yet, certainly not to any appreciable extent. But the state, at the time of the contest, would have given the overflowed land over to the county, under the Swamp Land Grant, and it would have passed very soon into private ownership, as did the swamp and overflowed lands, including the part of this lake which is in Indiana. Such was then, as always before the decision of this case, the policy of the state.

The state, following purposes of the grant under the

Swamp Land Act, had a larger and better policy than that which is favored by the opinion. The policy of the state was to allow the reclamation of the swamp and overflowed lands, and have them held for individual use and private ownership. The policy announced in the opinion by Mr. Justice Phillips would have subverted the object of the Swamp Land Act. Under his suggestions, a few hogsheads of water in a former meandered lake, although in depth insufficient for boating or for fishing, would control as to ownership, and keep the title in the state, without any advantage to anybody.

Apply the principle, for example, to Wolf Lake, the western part of which (Hyde Lake) was at the hearing divided into ponds, the water in which, as shown on Shedd's Exhibit, Map "C," had but a few inches in depth, while the eastern part (Wolf Lake) was kept at an artificial stage for the formation of ice; yet if the state in its sovereignty held title, it would be beyond the reach of private enterprise or development, although within the limits of a great city.

THERE IS MORE HERE THAN A MERE QUESTION OF BOUNDARIES. IT IS A QUESTION OF LEGAL RIGHT AS WELL AS ONE OF PROPORTIONS.

In the different aspects, it was not regarded rightly in the decree finally affirmed by the Supreme Court of the state. By such decree the defendant in error has added to his fractions of 4.53 acres and 7.37 acres, respectively, on account of an original frontage of about $\frac{3}{8}$ of a mile, about 320 acres, or perhaps more, as supposed accretions, such area being subject, also, to be much increased if Mr. Shedd's Ice Company should cease pumping water into

the lake, while the plaintiffs in error, with an original shore frontage exceeding 1¾ miles, were allowed to hold as attaching itself to their tracts but about 180 acres. This was violative of rules requiring account to be taken of the extent of the shore frontage of the several congressional tracts, and a consideration of proportions of area attachable to the same.

It will be argued that the disproportion, in attaching so much to Mr. Shed tracts, is incidental to a principle in respect to accretions, that the tract to which they first attach themselves, though only a thread runs from such tract at first, will take the additions, or so-called accretions, as far as they extend, and in whatever course, regardless of side lines of other shore owners. But, certainly, "lines and bounds," when they have to be thus determined, are very far from being certain; although in the opinion by Mr. Justice Phillips, from which the quoted words are taken, it was supposed that in letting each proprietor go "to the water's edge," one of them would "not come in between the lake and * * * (another) after the waters have receded beyond the center." (Record, 481.) Yet the decree in question is violative of the supposition indulged in the observations quoted.

Two patentees, Holbrook and Egan, entered tracts which were bounded by the lake. Their water frontage overlooked the lake, to and beyond the state line. But for a long distance from the water's edge, next to and in front of their tracts, the water had but little depth. In time, if not quite from the first, it was not deep enough either for fishing or for boating; and but little water remained, for quite a distance from the shore line; the part nearest such tracts shoaling into small ponds or

pools, or becoming muck. Then some of the space intervening between the more permanent water and the original western shore or water line of such tracts was by the decree called partly ridges and partly accretions; and the portion of these which the decree awarded to Mr. Shedd cut off from the remaining or more permanent waters the representatives of the Holbrook and Egan tracts.

The case is not supposititious. In the award to Mr. Shedd, as between himself and the plaintiffs in error, the appropriate side lines for extensions of the tracts are ignored or shortened by the decree.

Westward of the deeper and more permanent part of the lake was a narrow thread-like hump or ridge, more or less broken into parts, some of which were slightly higher in elevation than other parts of the bed, there being along the surface, between the more or less broken parts, three, perhaps four, small elevations, but little higher than the rest. These in the subsidence of the lake appeared above the water, and became islets or islands, and finally the decree supposes them to have become connected, and treats them as accretions to the two small tracts of Mr. Shedd, while the representatives of the Holbrook and Egan tracts are cut off from the remaining waters.

A suppositious case, but little more fruitful of wrong in its outcome, may be illustrated, by imagining a growth as an accretion (so styled by the decree), from one of Mr. Shedd's tracts, winding like a serpent in its course, and taking to itself the swallowing capacity of Aaron's rod, dominating the land surface exposing itself throughout the lake.

The supposed rule as to accretions is very uncertain in character when applied to such a lake as that now under consideration. It would necessitate not only partition, but re-partition from time to time, especially in the case of subdivision into small lots, and would frequently give rise to contests as to how the accretions grew, or where their first connection with the shore arose.

THE COMMON LAW RULES OF GIVING EACH SHORE OWNER A PROPORTION OF THE LAKE BED IS MUCH MORE REASONABLE AND PROPER IN APPLICATION.

The first step "would be to ascertain what were the water boundaries of the whole government subdivision," that is to say, of each government subdivision.

Jones v. *Lee*, 77 Mich., 35, 42.

> "Whatever water rights belong to any part of that subdivision must necessarily fall within those that belonged to the whole of it at the time when it was made ready for sale by the United States government, and no change, if any took place, in the shore line could enlarge that grant at the expense of any other. It is also beyond question that any owner of water rights within said subdivision could determine for himself in what way he would subdivide and parcel out his own property." (*Ib.*, 41.)

He would not be allowed "to cut off the water front of another owner while the water in front of such owner would be subsisting." (*Ib.*, 41-2.) The length of his shore line would be readily ascertained, and he would take a proportionate share of the water space adjacent to and fronting the same, including any knolls, islets or islands originally unsubmerged, but not sectionized; these passing to him from the government grant. Of course he would take any such unsubmerged elevation showing

its surface after such grant, within the defined space; side lines being extended from the established corners on the shore. He need not consider himself bound to inquire as to accretions, nor bound to consider whether a formation within the body of the water is a reliction. It is not a case of an island arising *de novo* in the King's seas, nor the King's arms thereof, of which mention is made in *Hale De Jure Maris*, c. 4; 8 *Bacon's Abridgement, Bouvier's Edition*, 19.

The decree is inconsistent in itself. It did not confine the defendant in error to an award of accretions on the principle that the tracts of defendant in error went but to the water's edge. It adopted in part the principle that the patent under which he claimed passed the islands, independently of the doctrine of accretions. (Record, 447, par. 67.) It was thus intended to cover the hypothesis that the common law rule prevailed as to islands not sectionized or surveyed. The inconsistency must be apparent; for the general theory on which the decree was framed was that the patentee took the land only to the water's edge, with an incidental riparian right to "follow the recession of waters to their edge" (Record, 481); the opinion of the Supreme Court of the state apparently excluding the right to reliction in such cases. (*Ib.*)

In the particular case a satisfactory adjustment has been made as to the South Bay, above named, when it alone is considered; but such adjustment remains to be made as to space north of the South Bay, such space extending from the west shore to the Indiana line. There are but two or three proprietors whose rights in respect to that space call for inquiry. The plaintiffs in error are substantially one, and the defendant in error is perhaps the only other per-

son having any claims necessary to be considered. The state should not be allowed to step in from a fancy that fish, if placed in any of the waters in Illinois, would thrive. When the original patentees have had to pay for the property thrice over, in the expense of contests and in taxes, good faith would require the state to stand aloof, confessing that, as the court finds the lake to be non-navigable, the state can show no title to it.

It is not reasonable to apply to such waters rules as to accretions or relictions which properly pertain only to navigable waters which are more permanent.

The definition of "Accretion," as given in 1 Am. & Eng. Enc. of Law, 2nd Ed., p. 467, would not characterize the process of enlargement of land surface in the case of tracts bounded by this lake. There would not be found to be "a deposit of earth, sand or sediment" on the land "by contiguous waters." There would, however, be found a growth of marsh or swamp grass; a marked evaporation of the water at intervals (Record, 195); a diminishing supply of water, as inflow from different directions would be cut off, in the deepening of the Calumet river and the general march of improvement; a general shallowing from one cause and another, including the growth of reeds, rushes and heavy grass (Record, 190); and from first to last a stillness and weakness that give the land rather than the water the chief supremacy, showing that in the uses to which the land can be put are the chief utilities to be expected.

The Supreme Court of Illinois, in *Braxon* v. *Bressler*, 64 Ill., 488, 489, said:

> "The common law is in force in this state, and its principles must control in the elucidation of the question" considered. And again, at p. 492, *ib.*,

> "The peace of society and the security of personal rights demand a legal recognition of the ownership of the beds of the streams within the state, as well as the water."

The policy of the state as thus declared has been determined in many cases, as applicable here, in all important elements, as in the case of a river; and such policy should not be considered as having been overthrown by the dictum adopted by the State court in this case.

A decree should be directed as heretofore indicated by this court, and in accordance with the judgment in *Hardin* v. *Jordan*.

Respectfully submitted.

THOMAS DENT,
for Plaintiffs in Error.

NOTE.—The opinion of Mr. Justice Phillips, printed in the appendix to the record in this case, pp. 461-482, from 161 Ill., 462-497, contains *errata*, here specified in part, namely:

Report, 463; Record, 462, "south-east" should read "south-west."

Report, 462; Record, 464, lands claimed by Gertrude H. Hardin, should be as described, *ante*, or in patent to John Holbrook. (Record, 245.)

Report, 463; Record, 462, "several thousand acres" is error. Part in Illinois contained 1,283.12 acres, as per certificate of Commissioner of General Land Office on the margin of the plat showing the survey of 1874.

Report, 466; Record, 465, plat shown is not a correct copy of the plat of the survey of 1834-5, nor of the survey of 1874. It does not give correctly the marginal line of the lake. For example, it makes much more of south-east fractional quarter of Section 20 than does the government plat. It extends that tract too far south and too far east. The original plat shows the lines as intersecting the state line at 22.69 chains south of the east and west center line of Section 20, or about half the distance shown on the plat given in the opinion. Also the township was fractional, and the east tier of sections were not of full size, by reason of the state line intervening. The sections shown next west of the state line are represented in the plat in the report as having full width, or more, east and west; and the same remark is to be made of the plat in the report, p. 465 (Record, 463); whereas the original plat shows that the east half of these sections had less than half the full width or area.

Both diagrams in the report, pp. 465-6, Record, 463,

464, show an outlet of the lake connecting it with the Calumet River, but very much enlarged over that shown on the government plat. (See map No. 1, *ante.*)

The second plat, entitled Diagram No. 2, shown in the opinion, p. 466; Record, 464, is the same as the former plat in the opinion, except that it purports to show the subdivision of the lake under the survey of 1874, but is incorrect in this respect, as also in other respects as above.

Report, 473; Record, 468, the west fraction of the southeast quarter of section 30, entered by William B. Egan, was not claimed by Gertrude H. Hardin as a whole. She only claimed such part as lay east of a line eighty rods east of and parallel with the north and south center line of section 30.

It is deemed unnecessary to specify other matters. These have been pointed out in order to draw attention more especially to the record, in different particulars.

In compliance with a Stipulation, a copy of the Opinions of His Honor Judge Tuley will be given below as Appendices.—An opinion by Judge Seaman is also so given as per stipulation.

APPENDICES.

Appendix No. 1.

Oral Opinion of Judge Tuley in Shedd v. Thomas, 442 and 443 Burnt Record, Cook Circuit Court, August 3, 1892.

Judge Tuley:

In these two burnt record cases, 442 and 443, commonly called the Shedd-Hardin cases, I have drafted an opinion, which I will hand down to the clerk, in which I have attempted to dispose of the principal questions made by the record, both of law and fact.

There are some questions not referred to in the opinion which were disposed of as the case progressed, particularly the question of jurisdiction.

I will adhere to the opinion expressed then, that the mere fact or allegation that the records of Cook County were destroyed by a fire, gives the court jurisdiction without reference to the question whether any part of the records pertaining to the title of the complainant were destroyed or not. I think a party has a right upon the allegation of destruction of records to come into court under that act (the Burnt Record Act), to establish his title, if only for the purpose of showing that there was nothing affecting his title which was destroyed by fire.

As to the principal contest, which is the contest between the two patent titles, one under the survey of 1835 and the other under the survey of 1874, I have felt compelled to follow the decision of the United States Supreme Court in the case of *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, being of opinion that the best authority as to the grant by the United States, and the effect of such grant is the United States Supreme Court itself.

It is true that that decision was rendered in an ejectment case in which there has since been a new trial granted in the lower court, but I recognize it as a binding authority and as a final authority upon the law point decided as if it had been given upon a second trial, the last trial in ejectment.

In the 137th United States, *Packer* v. *Bird,* the court well recognizing its former decision to the effect that the decision of the State Court as to the authority of the state over the waters within the state and relations of the state to the shore would be followed as it is there stated, that they will only be followed so far as they do not interfere with the grants made by the United States or the beneficial use of those grants. But it is sufficient now to say that I have recognized those two cases of *Hardin* v. *Jordan* and *Mitchell* v. *Smale,* made concerning these same patents under the survey of 1835 and the patents under the survey of 1874, and concerning these same lands or a portion of the same land which is now in controversy, as of binding force in deciding this case upon me, and in accordance with those decisions I have held that under the survey of 1835 the patents issued to Douglas, Holbrook, DeWitt (Egan), conveyed all the title that the United States had both in the land abutting upon the lake and in the bed of the lake to the center thereof, and that nothing after the issue of those patents remained in the United States to grant and, therefore, nothing passed by the patents issued upon the survey of 1874.

As to the contention of actual residence for seven years under a title deducible of record from the United States or some officer authorized to sell land for taxes, as provided in the act of 1835, I have endeavored, in the opinion, to give the reasons why I have found that, as to each and every one of the parties making that claim of actual residence, there is a failure of proof as to some portion of time included in the seven years, and that in no one case have the parties been able to make out seven years actual residence from the time of the issuing of the patents under the survey of 1874.

I have held as to the certificate conferring an equitable title—it evidently conferred no legal title—that there can

be no equitable title in land. There may be an equity, but there can be no such thing as an equitable title in land, without the party stands in the position whereby he is ready to demand the legal title, and the certificate did not give these parties a right to demand the legal title of the government of the United States, because the legal title of the government of the United States had been conferred under patents issued under survey of 1835. That it would be like holding because A paid B money for land belonging to C that that gave A an equitable title to the land.

As to the tax titles I have endeavored to review each of them. I have found them, without exception, to be bad, and I have also held that while they may act as a color of title, no invalid tax title could form the basis for a seven years' actual residence under the statute of 1835.

As to the titles of the complainants Shedd and Hardin, without reviewing again the authorities, I have found that they have a good title under the survey of 1835.

As to the double description of the land conveyed in the same deed affecting the Hardin title, I have held that the parties to those conveyances, and who were interested in the land, have acquiesced in the construction which was given by the grantees as to the land conveyed and that an outsider can raise no question whatever, but it operated practically, or would operate as a division or a partition between the parties owning the land.

There, then, remains the question only as to the interests of Shedd and Hardin in the land uncovered by the recession of the waters of the lake and in and to the bed of this lake. I think the opinion will be found sufficiently definite to convey the idea of the court as to the partition or rights of the parties in that regard. It is sufficient to say generally that I have followed the opinion of the United States Supreme Court in the Hardin case in making the division as to the bays, and I think that the tongue of land running down from the southwest quarter of section twenty, in fact, according to the evidence, made a bay to the west of that tongue of land between that and the Hardin property.

I have found from the evidence, although the evidence is not clear and positive as to the amount of land which was contained in the two tongues of land (that in the south-west quarter of section twenty, and that known as fractional section twenty-nine), yet from the evidence I have found that the north tongue of land did run substantially down to the south line of the south-west quarter of twenty, and I have treated the land between that south line of the south-west quarter of twenty and running the line down to the Hardin land upon the west as a bay, and, as in the Hardin case in the United States court, dividing the bay between the opposite shore corners, I have decreed that that bay be divided between the opposite shore owners, Hardin taking towards the east and Shedd taking towards the west to the center of the bed of the lake, the meander line, so far as it is run, forming the basis for the commencement of the division between the parties, or for running the division between the parties.

In regard to the point of land at the south end, known as fractional section twenty-nine, there was also much more land than was shown upon the recorded survey of 1835. I have in regard to that, as in regard to the south-west quarter of section twenty, indulged the presumption, or looked upon the evidence in the most favorable light, it may be said, as to the quantity of land which was embraced in those two tongues of land running up into the lake, most favorable to the owners of the patent title under the survey of 1835, and I have thought from the evidence, that it would be equitable and fair to consider that tongue of land as running up to the north line of the south-west quarter of twenty-nine, and treating that portion of the bed of the lake between that tongue of land and the Hardin property upon the west side of the lake as a bay, have divided that bay or the land which has been left by the recession of the waters, or may be left by the recession of the waters between Shedd and Hardin, the owners of the tongue of land on the east and Hardin the owner of the land upon the west. So, practically, that bay runs up north under this division to the north line of the south-west quarter of twenty-nine.

That leaves undisposed of the land between the south line of the south-west of twenty and the north line of the south-west quarter of twenty-nine; all of that frontage beween those two points upon the lake (Hyde lake), and what was originally known as "Navigable lake," lies in front of Hardin's property.

Hardin will take under this decree all land in front of his property between the south line of the south-west of section twenty and the north line of the south-west quarter of section twenty-nine to the center of the lake.

I have not attempted to fix the center of the lake by decree further than to declare that the lake ought to be divided with the line drawn north and south. In other words, that the two points of the lake furthest distant one from the other, lying upon the north and south ends of this lake, north and south sides of this lake, and I have declared that the center line of the lake went to, east of what is called the state line, such line between the State of Indiana and the State of Illinois, dividing the lake into two parts, I have declared that the court will go no further than the state line in making a division between these parties as to the land which has been or may be uncovered by recession of the waters, and as to the rights of the parties in the bed of the lake covered by the waters.

These rights, however, are especially declared to be subject to the rights of riparian ownership which are, of access to the water, of usage of the water for cattle and so forth, for domestic purposes, and also, as to what I have termed a common right, founding my decision largely upon the English cases of the House of Lords in regard to the Scottish lakes, that there is a common right in all other owners upon these non-navigable lakes of boating, fishing, hunting, and any other right to which a party may put the use of water which is common to all, the other owners of such lake, and thus the rights of Hardin and Shedd will be declared subject to these common rights specified in the opinion.

* * * * *

Appendix No. 2.

Opinion by Judge Tuley, Filed August 3, 1892.

Charles B. Shedd
vs.
Elizabeth P. Thomas *et al.*
} B. R. 442. *Circuit Court of Cook County.*

Same
vs.
J. Ensign Fuller *et al.*
} B. R. 443.

Tuley, J.:

There are in these cases two apparently opposing patent titles. The complainant in original petition, Shedd, and the cross-complainant, Hardin, claim under patents issued under the United States survey of 1834-5, by which they allege their lands were bounded by Wolf Lake, a meander line having been run in that survey in order to ascertain the quantity of upland in the fractional sections and subdivision of sections abutting on the lake. The other parties to this suit claim under patents issued upon survey made by order of officers of the United States land department in 1874, whereby a part of the bed of Wolf Lake was surveyed as United States government land, the quarter section lines of the survey of 1835 being extended across from the meandered line, whereby the entire bed of the lake from the shore line to the state line between Indiana and Illinois was surveyed. The state line ran through Wolf Lake near the middle thereof.

In 1882, and prior to the commencement of these consolidated cases, certain ejectment suits were commenced by the holders of the patent title under the survey of 1835 against certain persons in possession of the bed of the lake under patents issued on the survey of 1874. These suits were consolidated in the United States Circuit Court for this district into two cases, *Mitchell* v. *Smale* (Mitchell representing the Shedd interest), and *Hardin* v. *Jordan*.

The cases were tried and went to the Supreme Court of the United States, where they were decided in 1890, reversing the judgments of the lower court. Judgments were entered in the United States Circuit Court in pursuance of the United States Supreme Court decision, but a later decision of that court held that the defeated party was entitled to a new second trial, and both said cases now stand for new trial in the United States Circuit Court.

It is clear that the main question presented to the United States Supreme Court was, which was the superior title to the bed of the lake, claimed to have become largely dry land by a recession of the waters of the lake, the title of those claiming under the survey of 1835, or the title of those claiming under the survey of 1874.

That court held those claiming under the survey of 1835 to have the better title, and that the survey of 1874 was without the authority of law, and that all the acts of the land department in reference to the survey of 1874, including the issuing of patents, were void and of no legal effect. The United States Supreme Court, in the opinions in the two cases, enunciated important principles of law, applicable to lands bounded on non-navigable waters. There was a divided bench, showing thereby mature deliberation of the court. The law thus laid down was not only for the government of the cases then before the court, but was also for all future cases involving like questions.

The court held, *inter alia*, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed as to their legal effect according to the law of the state in which they lie.

That at the time of the grant by the United States of the lands bounded on the lake, under the survey of 1835, the common law of England, as it existed prior to the fourth year of James the First (1606), had been, by express statute passed as far back as 1819, declared to be the law of this state, and must govern as to the legal effect of the grants by the patents, issued under the survey of 1835.

That by such common law, under a grant of lands bounded on a lake or pond which is not tide water and is not navigable, the grantee takes to the center of the lake or pond ratably with other riparian proprietors, if there be such, and that this rule prevailed in Illinois when the patent to Hardin's ancestor was granted in 1841, and is still the law of this state, notwithstanding the decision of our Supreme Court of Illinois in *Trustees of Schools* v. *Schroll*, which appears to hold an opposing doctrine, *i. e.*, that under a grant of lands bounded by a lake the shore proprietor did not take to the center of the lake, but only to low water mark.

In the ejectment suit of *Hardin* v. *Jordan*, it was contended, as here, that, it appearing by the field notes that the lake had been meandered in the survey of 1835, although such meander line did not appear upon the plat prepared from such field notes, that such meander line was a line of boundary for the shore proprietors. But the United States Supreme Court held, that "It has been the practice of the government from its origin in disposing of public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream or other body of water," and that such meander lines "are run for the purpose of ascertaining the exact quantity of upland land to be charged, and not for the purpose of limiting the title of the grantee, to such meander lines," citing cases from Wisconsin, Michigan, Indiana, Iowa and United States Reports, and from our own state—the cases of

Middleton v. *Pritchard*, 3 Scam., 510.
Canal Trustees v. *Haven*, 5 Gilman, 548, 558.
Houck v. *Yates*, 82 Illinois, 179.
Fuller v. *Dauphin*, 124 Ills., 542.

In the face of the Illinois decisions that a meander line is not a line of boundary, and that of the United States Supreme Court as to the bed of the lake here in question, that this particular meander line is not a line of boundary, there is no room for the contention that it is a line of boundary.

The United States Supreme Court in the Jordan case, in construing the effect of the grant of the land abutting on the lake, "according to the official plat of the survey" of 1835, also held that in 1874, when the water had receded, leaving a portion of the bed of the lake uncovered, the United States did not, but the shore proprietors did own, not only such uncovered land, but the bed of the lake to the center or middle thereof. That therefore the United States owned no land on or in this lake to be surveyed in 1874, and consequently that all the acts of the Land Department in making the survey, and in issuing the patents under such survey for the bed of the lake inside of the meander line, were null and void.

That such Land Department had no jurisdiction of the subject-matter or of the persons, and its adverse decision, as to the claim of the shore owners as to the bed of the lake, was of no effect, for the same reason.

Hardin v. *Jordan et al.*, 140 U. S. R., p. 371.
Mitchell v. *Smale*, 140 U. S. R., p. 406.

I am of the opinion that the highest and best authority, in construing a patent of the United States, and as to its legal effect, is the Supreme Court of the United States.

Lender v. *Kidder*, 23 Illinois, 49.
Packer v. *Bird*, 137 U. S., 669.

It is said, however, that in *Hardin* v. *Jordan* and the other ejectment suit of *Mitchell* v. *Smale*, a new trial has been granted. That the effect is a new trial, both as to the law and the facts. I apprehend that this fact does not do away with the law as laid down by the Supreme Court; that a meander line is not a line of boundary; that the grants to the shore owners under the survey of 1835 conveyed all interest the United States had in the upland abutting on the lake and in the bed of the lake itself, and that the survey of 1874 and all proceedings and patents thereunder were null and of no effect, and that, at the date of issuing the patents under survey of 1835, the common law of England, as it existed prior to the fourth year of James I, governed and determined the rights of the shore proprietors.

It is contended by those claiming under the survey of 1874 that this court should follow the decision of the Supreme Court of Illinois in *Trustees of Schools* v. *Schroll*, 120 Illinois Reports, which appears to hold that where land is conveyed bounded upon a non-navigable lake, the grant extends only to the water's edge. The United States Supreme Court, in *Hardin* v. *Jordan*, comments at length on this case and refused to recognize it as the law of Illinois controlling the rights of shore owners on Wolf Lake under the patents based on the survey of 1835, and hold in effect that the language of the Illinois court in that case upon that point was *obiter dicta*. It appears to me that the decision of the United States Supreme Court in *Hardin* v. *Jordan* must control this case, as the rights of the owners of the shore lands under the survey of 1835 became fixed and determined under the law of Illinois, as declared by the Illinois Supreme Court in several decisions prior to that of the *Trustees* v. *Schroll*, 120 Illinois, and could not be changed by this later decision.

But it is argued that a different case is made here to that made in the ejectment cases.

The questions as to the nature of the grants by the United States, under the survey of 1835, and as to what passed thereby must necessarily always be the same.

That there was a strip of land, in what was marked on the plat of the survey as part of the bed of the lake, running out from the meander line of fractional southwest one-fourth of 20, and from what was called fractional section 29, as clearly appeared in that case, as in the one at bar.

The special finding of Judge Gresham in No. 4 of such findings, as to the condition of the strip of land in question, and as to how far there were in fact two lakes and not one, I regard as substantially correct (as shown by the evidence in this case), *i. e.*, as to condition of said ridge of land at the time he rendered his decision. Also that such was substantially the condition of said ridge of land (as to waters of said Wolf Lake) for many years prior to 1874, and up to the time when the artificial cut was made from Hyde Lake to the Calumet for the purposes of the Chicago and Southern Railroad.

Since the cutting of that new outlet from Hyde Lake to the Calumet River, the waters of Wolf and Hyde Lake have receded so as to leave more uncovered land of the bed of the lakes than there was at the time of the survey of 1874. The condition of the ridge and the amount of land uncovered (which by the plat of survey of 1835 was marked "navigable lake"), at any time subsequent to the survey of 1874, is of little or no relevancy in this case.

The only vital question in that regard is, what was the condition as to land and water at the time of the survey of 1834-5, and as the claimants under the survey of 1874 attack the survey of 1834-5, the burden of proof is upon them to show unsurveyed or omitted land.

The presumption is that the survey was made in good faith and that the United States officials acted honestly and faithfully in regard thereto. This presumption of law is not easily overthrown after the lapse of fifty years.

If there was evidence in the ejectment case clearly showing the condition of these lakes, Hyde and Wolf, as to land and water at the time of the survey of 1835, it has not been produced in this case.

The evidence tends to show that the survey of 1835 was made at a time of high water, and when the water was two feet or more above the ordinary level of Lake Michigan, but for how many years before or after the water of Wolf Lake was or was not at the same stage, at the same time of the year, as it was when the survey of 1835 was made the evidence fails to show.

That there was some land not covered with water inside the meander line (particularly in southwest one-fourth of section 20 and section 29) at the time of the survey of 1835 there is no doubt, but it is impossible from the evidence to ascertain the exact quantity of such land. The evidence fails to show that there was such an excess in quantity, over what the plat exhibits, as to show either fraud or mistake of the surveyor.

If there was any land between the meandered line and the center of the lake, the shore proprietors (the lake being the boundary) would be the owners thereof under

the common law, and the decisions of our own Supreme Court, cited and commented on by the Supreme Court of the United States in *Hardin* v. *Jordan, Mitchell* v. *Smale, supra.*

(See the authorities cited in *Hardin* v. *Jordan.*)

Independent of the question whether the proof as to omitted lands, omitted by mistake or fraud of the surveyor, can be raised under the pleadings, the holders of the 1874 survey title are in no position to question the survey of 1835. The survey of 1874 was not made on any such theory of mistake or fraud. The survey of 1874 was based on the correctness of the survey of 1835 and on the theory that the meander line was a line of boundary, and that land represented as in the bed of the lake had become by the recession of the waters dry land, susceptible of cultivation, and that the United States owned the same.

The survey of 1874 cannot be sustained on any theory of omitted lands, as contended for by the Jordan interest. From the authorities, the United States is the only party that could challenge the survey of 1835 for fraud or mistake, and the United States could not, if it had parted with all its interest in the shore lands and the bed of the lake, nor could it do so as against *bona fide* purchasers of the land without notice.

I therefore hold that the claimants, under the survey of 1874 and patents thereon, acquired no title or interest by virtue of such patents.

Without entering into a review of the claims of title under the patents issued to Holbrook, Douglas and De Witt, it is sufficient to say that there is no question but that Shedd, the complainant, is seized in fee simple of the fractional southwest one-fourth of section 20 and fractional section 29 by title deraigned from the Douglas and De Witt patents.

As to the Hardin title, which comes under the Holbrook patent, I find no difficulty in coming to the conclusion that she also is seized in fee simple of the several tracts claimed in her cross-petition. I regard the apparent contradiction in some of the deeds, granting the

"undivided half" and the south half of the tract in the same deed, as of no importance in this case. The parties in interest treated the deeds, as between themselves, as conveying the south half, and, as to all third parties, the conveyances and acquiescence therein by the parties should be treated as a partition between the parties in interest.

The defense is made of the Statute of Limitations of 1835, which provides for a title derived by

> "possession by actual residence thereon for seven successive years having a connected title in law or equity deducible of record from this state or the United States, or from any public officer or other person authorized by the laws of this state to sell such land for the non-payment of taxes * * * but when the possessor shall acquire such title after taking such possession the limitation shall be good to run from the time of acquiring such title."

It is evident from the statute that the possession and title must concur.

The certificates were issued under survey of 1874, on June 14, 1881, the patents July 2, 1881. These suits of Shedd were commenced in 1888, June 29th and 30th. If actual residence is made out by the proofs, it is for full seven years between the date of the certificate of payment of the money to the United States receiver and the commencement of these consolidated suits, but it is for less than seven years if we commence counting residence from the date of the issuing of the patents.

The legal title remained in the United States until the patent issued. It did not pass by the receiver's certificate. Did the certificate confer an equitable title? Where one, being the real beneficial owner of the land, has a right to demand the legal title, he owns what is termed an equitable title. The difficulty about the equitable title here is that the actual legal title was in grantees under the survey of 1835, and there was no right in the holders of the certificate of payment to the United States to demand such legal title. There was in the United States no legal title to be demanded. To hold this to be

an equitable title would be equivalent to holding that A, by paying money to B, for land owned by C, had an equitable right to demand a conveyance from C.

It is contended, however, that Hardin's cross-petition was filed more than seven years after the patents issued, and, therefore, there was actual residence for seven years before the commencement of her suit.

Hardin was made defendant to Shedd's petitions filed June 29th and 30th, and I am inclined to the opinion that the court acquired, by filing the petition, jurisdiction over the *res* (the land) in controversy, and that in analogy to the rule governing suits in partition, all parties to the suit are actors, and that the filing of the bill stopped the running of any limitation statute as to all parties thereto, whether complainants or defendants.

But if that position is not tenable, the question arises, can the patents issued for land the United States did not own, by officials of the United States without authority or jurisdiction to issue the patents, be a foundation for seven years' actual residence under the statute as a title deducible of record from the United States?

If a sheriff should issue a deed purporting to be a tax deed when no tax had ever been levied, nor sale had, or if state officers should issue a deed to land which the state did not own and never did own, or to land which the state had conveyed forty years previously, could it be pretended that such deeds would form a basis for a title under the statute? I think not.

Moore v. *Brown*, 11 Howard, U. S., 416.

If these parties are chargeable with notice of the records of the Land Office as to the prior sale of the land, and that the United States had no land to patent, as I think they were, could they by obtaining a patent make it a basis for the running of the statute? It certainly would be against conscience to permit such a deed to be made a foundation upon which to deprive the real owner of his property.

If these patentees are chargeable as a matter of law or fact with knowledge of the applications and affidavits

upon which the survey of 1874 was ordered, can they advantage from patents issued thereon? Some of them must have had actual knowledge, and all who received patents must, in my opinion, be charged with constructive knowledge of the contents of the affidavits so filed; and, if they knew, as they must have known by actual residence upon the ground, that the said affidavits were untrue in more than one material matter, I am of the opinion that a court of equity must hold that a patent so obtained cannot by the original patentee be the basis for a title "deducible of record," and for the running of the statute.

This is not like the cases where it has been held that title under a patent fraudulently obtained cannot be attacked collaterally, or set aside as against *bona fide* purchasers without notice. In such cases it has been held the legal title passed from the United States, notwithstanding the fraud, but here the United States had no legal title to pass. Here the question is whether an apparent legal title obtained by a constructive or an actual fraud can be set up by the original grantee as a basis for the running of the statute. I think not.

If any of the defendants, not the original patentees or mixed up with the survey of 1874, bought in good faith and occupied after their purchase by seven years' actual residence, prior to being brought into court in this suit, it may be that such residence might avail them under the statute, but those who assisted in the survey of 1874, a survey of "land alleged to be fit for cultivation" made, accompanied by a boat, the chain bearer in water up to his chin, pegs three to six feet long used to fix corners, or those who were parties to the applications for the making of such survey, or those who are chargeable with actual notice of the falsity of affidavits upon which the survey was ordered, cannot have any standing in a court of equity to claim that the court should by its decree enable them to profit from such acts.

It is, however, not necessary to hold that the patent under the survey of 1874 cannot be made the basis or source of title under the limitation act of 1835.

Was there, as to any of the tracts in question that continuous, actual, visible, open and exclusive possession and residence; that union of title and actual residence required to constitute a defense or a title by limitation?

AS TO THE ALICE CONDIT TRACT. THE FRACTIONAL SOUTHWEST QUARTER OF SECTION 20.

The evidence shows a period of several months between the spring of 1881 and May, 1882, that Mrs. Alice Condit was absent in Indiana, and did not, therefore, actually reside upon the property. If it could reasonably be contended that Smale was her agent, and held possession for her, it does not appear that he was in possession for Ord, after she sold to Ord in July, 1881, nor is the evidence satisfactory that any one was in possession for several months between the dates stated.

A house kept locked up for months cannot be said to be the actual residence of any one. The moment it is abandoned as a residence and ceases to be actually resided in, the constructive possession of the actual owner attaches and the running of the statute is suspended. It is also suspended when there ceases for one moment to be an union of actual residence and title. There is an apparent interregnum of the union of residence and title between the date of the assignment of the Smale lease to Jordan and Jordan's acquisition of title.

I have no doubt from the evidence that Mitchell found the premises, both the Alice Condit and Ellis Bennett houses, vacant, and that actual possession was taken by Newsome under Mitchell's verbal lease to him.

AS TO THE FOUR AND ONE-HALF ACRES, SOUTHWEST ONE-FOURTH OF SECTION 20.

The title deducible of record is the tax deed, S. Park Commissioners to Bennett. This deed is void on its face. It purports to be a deed for a sale made subsequent to date of deed. It could confer no title. It could not be corrected by the officer making a new deed. His power was exhausted when he made the first deed. The mistake could only be corrected in a court of equity. It is also void for reasons hereafter stated.

AS TO THE FIELD RESIDENCE. FRACTIONAL SECTION 29.

As to actual residence on this tract. The evidence fails to show any such occupation for some months after Barnes left in 1882 or 1883. Also for some months after Fogli left in 1885 and before Chandler moved in.

AS TO THE REESE PLACE.

The evidence of the occupation from 1878 to 1881 is not of that satisfactory character to found adverse possession upon. There was a residence occupied by Reese south of near the south line of fractional section 29. On this section line he had a fence and one or two old barns or sheds on the fractional section 29 north of the fence. There was no inclosure of where the barns stood. The title was in Forsythe for part of the time, and Reese stacked Forsythe's hay on Forsythe's land. It is doubtful from the evidence, to say the least, whether his possession was adverse to Forsythe.

The evidence of the alleged purchase of the seven and one-half acre tract by Forsythe for Reese is indefinite, unsatisfactory and insufficient. The evidence tends to show a verbal express trust, obnoxious to the statute of frauds, rather than a resulting trust.

THE SOUTHEAST ONE-FOURTH OF 19. FARRAND PLACE.

The evidence shows lease to Rosenquist from Jordan, March, 1882, when Jordan had no title until October, 1882. There was then no union of residence and title. Rushmore's possession was a divided possession not exclusive. Conyvesey was in possession for Hardin, and cut hay two or more years on part claimed by Rushmore.

Rosenquist also within the alleged term of seven years was advised by the agent of Jordan, Bennett, that he must make terms with Hardin as to his further occupation, and he did so. This interrupted the running of the statute.

I find that the evidence tends to show a break in the actual residence about November, 1887, after the death of Chickey. There was certainly quite an interval of time between the time the Chickey family vacated, and the house they occupied was torn down, and the new house was built.

THE RAND TRACT.

What has been said as to Conyvesey's divided possession with Rushmore affects also this claim of adverse possession. Nor is there any doubt but that Killam Smith took lease from Hardin, and was in as Hardin's tenant.

As to the railroad and the McDaid and Thomas and other defendants, there is no claim of adverse possession by actual residence thereon, but they all claim through the patent title of the survey of 1874 or through tax titles or both.

I have disposed of the claims based upon the survey of 1874.

AS TO THE TAX TITLES.

It is unnecessary to take them in detail. It is sufficient to say that I am clearly of the opinion that there is not one of them that is valid.

I understood our Supreme Court in *Elston* v. *Kennicott,* 46 Illinois, overruling *Irvine* v. *Brownell,* 11th Illinois, has held that an invalid tax deed, although it may be sufficient as to color of title, cannot be made the basis of title under the Limitation Statute of 1835, concerning titles deducible from an officer authorized to sell land for taxes. See also *Moore* v. *Brown,* 52 U. S., 114.

The objection, as to the excess of costs included in the judgments in all cases in which sales were made prior to 1880, is well taken. (*Coombs* v. *Coffe,* 127 Illinois, 431.)

This objection applies to six out of the eight tax sales relied on in opposition to Shedd's title, and which were

argued by Mr. Mecartney. Certain of the sales are also subject to the objection of excessive interest being included as pointed out by Mr. Mecartney. The sale of September, 1880, for eighth installment South Park tax is invalid, because the affidavits filed fail to show the diligent inquiry required by the statute, as to the assessor and as to the owners. The sales of 1884 for 1883 taxes to Reed is subject to the fatal objection, among others, of a want of process.

Ogden v. *Barnes,* 125 Ills.

The affidavits which allege service of notice by leaving it with some other persons are insufficient. The publication notices which fail to give the specific date of the expiration of the time of redemption and those "to whom it may concern" are insufficient. I do not know if counsel deem it necessary to specify the specific grounds of invalidity of these tax deeds, if they do, and those named in this opinion are deemed by them insufficient, they may present others to be passed on before the decree is settled. The objections above noted, some of them apply to the following deeds, as well as the objections hereafter specifically named:

The tax sale, northeast one-fourth of section 30, dated August 1, 1879, reciting sale of November 9, 1879, was void on its face. The clerk had no right to issue a new deed, first, because his power was exhausted in issuing the first deed. If there was a mistake, the correction could only be made in a court of chancery. Second, because the second deed was not issued within two years alter the sale. The description is also so indefinite as to make the deed void.

AS TO THE FOUR TAX DEEDS SET UP BY FULLER.

The tax deed to Hamilton September 6, 1875, under sale of April 6, 1873, of west one-half, northwest, southeast of 19. No judgment or precept was offered, and it was sold again within two years.

The deed to Hamilton March 5, 1877, of undivided twenty acres in southeast one-fourth of southeast one-fourth of section 19, is a void description. The published notice was also insufficient.

The tax deed to Hamilton May 31, 1877. No judgment or precept was offered to sustain it.

The tax deed July 23, 1880, to Hamilton of northeast, southeast 19 is defective. The notice in application for deed describes the land as in section 9 in place of 19.

The tax deed sale of September 20, 1883, to W. K. Reed is void. There is no sufficient description of the property. It appears that Hardin redeemed from one sale of fractional southeast one-fourth of 19, which covered all of the land in that fraction.

The Crawford tax deeds as to northwest one-fourth of 29. There is no allegation or answer to support the tax deeds offered in evidence.

AS TO THE REFUNDING OF THE TAXES AND COSTS PAID.

The complainant, Shedd, and the cross-complainant, Hardin, seek to remove those various tax deeds as clouds. As a condition of doing so, they must pay the money paid under the sale with interest at six per cent., together with other costs paid by the holder of the tax certificate. As proven in this case, where there is no proof, there can be a reference to a master to ascertain and report amounts paid. If there is any doubt or contest as to when the said amounts are to be paid, that question may be reserved and the amounts decreed to be paid into court to abide decision as to who may be entitled thereto. I am of the opinion these taxes, etc., should be refunded upon the ground that the state had the right to tax this land which the water has uncovered, and might adopt any description which would identify the land taxed, even the invalid survey of 1874.

The question next presented is, what are the rights of the holders of the first patent title in the land uncovered by the recession of the waters, and what are their rights in the bed of the lake covered by water.

The contention of the complainant Shedd is that the patentees take to low-water mark, and that if the court holds that patentee takes the bed of the lake, such bed should be divided by section and quarter-section lines, giving to the shore owner the full section or quarter-section called for by the patent under which he claims.

AS TO THE HARDIN CONTENTION.

It is, as I understand it, that the shore owner patentee takes to the center of the lake, extending the section lines at right angles without regard to the number of acres so covered.

The highest court in the land, the United States Supreme Court, in the two cases, *Hardin* v. *Jordan* and *Mitchell* v. *Smale, supra,* has declared the law in regard to the rights of parties claiming under the first patents issued, as to a portion of the lands in question in this proceeding.

In *Hardin* v. *Jordan* that court held that the law of Illinois, as it was at the time the patents issued under the survey of 1835, determined and fixed the rights of the patentees.

That the common law of England, prior to the fourth year of James I, was then and is still in force in this state.

That under the decisions of this state, and of the United States, the meander line was not a line of boundary; that as the patents identified and referred to the official plat of the survey of 1835 and as that plat marked the lake as the boundary, the lake, and not the meander line, was the boundary line.

> "That a lake, or pond, like a river, is a concrete object, a unit, and when named as a boundary, the natural inference is that the middle line of it is intended, that is, the line equi-distant from the land on either side."

The court held the law, as laid down by the Supreme Court of Illinois in *Beckman* v. *Kreamer,* 43 Ills., 447, as to the riparian rights of shore owners on rivers, to wit, that the shore owners took to the thread or middle of the stream, was the law of this state, as applied to the rights of shore owners on non-navigable lakes.

The official plat of the lake in question was before the United States Supreme Court, and this map or plat showed Wolf Lake to be almost round, and also that cer-

tain shore owners on bays could not reach the center of the lake by any direct extension of the side lines of their property.

Did the United States Supreme Court, in the *Hardin* v. *Jordan* case, decide what was the common law as to the rights of these shore owners in the bed of the lake? If it did, I am unable to perceive why it is not the law of this case upon that question. If any rule was laid down in that case for a division of such bed of the lake or of the land uncovered by the recession of the water, it must be held to be the law applicable in the case at bar.

In the Jordan case, the lower court had given judgment for Hardin to the land to low-water mark, but in favor of Jordan to the balance of the southeast one-fourth of section 19, and of northeast one-fourth of 30, being inside of the low-water line.

The United Supreme Court, in its opinion, holds:

> "On the whole our conclusion is that the court below ought to have given judgment for the plaintiff Hardin as against the defendant Jordan to the center of Wolf Lake, instead of to low-water mark in front of the southeast fractional one-fourth of section 19, and of the northeast fractional one-fourth of section 30, and to the middle of the bay or projection of said lake of the east part of the southeast fractional one-fourth of said section 30."

Substantially the same judgment was directed to be entered in the case of *Mitchell* v. *Smale*. What the court means by the center of the lake does not clearly appear, whether, as the lake is round or nearly so, the center is a point equidistant from all points of the circumference, so that the lines of shore owners running to that point would resemble the spokes of a wheel, whether by the "center" was meant the thread or middle of the lake, drawing a line thrugh the middle, from its two points farthest distant from each other, dividing it as near as may, as if it was a river. The two points farthest distant from each other would be the north and south ends of the lake.

The court evidently perceived the difficulty of extending the side lines of the shore owner to the center, if it was a circular or nearly circular lake, because the opinion says:

> "If any question should arise between the plaintiff and any other riparian owner of lands situated on the margin of the lake as to the convergence of the side lines of the plaintiff's lands in the lake, it can be disposed of by the parties themselves by a resort to a court of equity, or to such other form of procedure as may be proper,"

also

> "that where a lake is very long in comparison to its width, the method applied to rivers and streams would probably be the most suitable for adjusting riparian rights in the lake bottom along its sides and the use of converging lines would only be required at its two ends. But whatever mode of determining the outgoing lines, as between adjoining owners, should be adopted in special cases which may be left for determination when they arise. There can be no difficulty in the present case as between the plaintiff and defendant."

The court reviews the decisions of different courts as to the rights of the shore owners in the bed of a non-navigable lake, and comment at length upon the decisions which hold that the riparian owner of a fractional lot bounded by a non-navigable lake takes so much of the lake bottom as is required to fill out the section or quarter-section of which he owns the fraction. The decisions commented upon are two of the leading decisions relied on by Shedd, *Clute* v. *Fisher*, 65 Michigan, 48, which was followed by *Stoner* v. *Rice*, 121 Ind., 51, and also upon the decision of Judge Gresham in the *State of Indiana* v. *Milk*, 11 Bissell, 197, wherein he holds that the rule applicable to rivers could not well be applied to lakes where there was no thread or current and more or less circular in form.

The United States Court holds that the arguments, *ab inconvenienti*, is not sufficient to justify an abandon-

ment of the common law rules which have been adopted in Illinois, and that the Michigan and Indiana

> "method of disposing of the subject might be convenient and attended with some advantages if it were sanctioned by law, but that there is not greater reason for adopting such a departure from the common law than that followed in *State of Indiana* v. *Milk.*"

The Michigan and Indiana rule commends itself, to my judgment, for the reason that, in a large number of cases, it has been held that the patentee took all the lands in the fractional section, without regard to the number of acres specified in the patent, and large quantities of land beyond the number of acres specified in the grant, even islands of large size have been held to pass by the patent of the shore land.

Among the cases so holding are

Houck v. *Yates,* 82 Ills., 179.
Forsyth v. *Smale,* 7 Biss., 201.
St. Clair Co. v. *Lovingston,* an Illinois case, 23 Wall., 46.
Shufeldt v. *Spaulding,* 37 Wis., 668.
Brown v. *Clement,* 3 How., 667.

It would seem to be reasonable that if this is the rule as to land above water in excess of number of acres mentioned in the patent, that the patentee should take all in the quarter-section or sections, as the case might be, as fast as the same became uncovered by a recession of the water.

But I construe the decision of the United States Court in the *Hardin* v. *Jordan* case as in effect overruling the Michigan and Indiana rule.

What rule can be laid down from the authorities for a division of the bed of the lake between shore owners?

Much of the bed which was covered with water at the time of the survey of 1835 has since became dry land. The amount increases year by year, so that it is reasonably certain that within a few years after the completion of the work of deepening the Calumet river, now in progress, there will remain but very little, if any, of the

bed of Hyde Lake covered by water. The part that might remain covered by the water would be so shallow that the shore owner might, with a reasonable expenditure of money, make the same available for his own use.

Under the view I have taken of this case Shedd and Hardin are the only parties to this suit interested as shore owners. The side lines of Hardin's tracts, extended, would come in conflict with the side lines of Shedd's two tracts, if they were extended. Upon what principle shall the uncovered land and land covered with water be divided between them? The rule adopted in an Illinois case of dividing the center of thread line of the river into as many parts as there are lots owned by the shore owners on the river, and making such parts of the thread *pro rata* the size or frontage of the lots on the river bank, cannot be adopted in this case.

It would not be equitable to take the meander line as a basis for making the division according to the frontage, for the reason that it did not represent in fact the water line, notably as to southwest one-fourth of 20 and fractional section 29, there was uncovered by water, at the time of the first survey, several times the number of acres represented in the government survey as upland.

I have, after mature thought, concluded that to follow out the theory or principle laid down in *Hardin* v. *Jordan* as to the rights of shore owners and the division of the bed of the lake between them the court should, as near as possible, determine how far south the tongue of upland shown on government plat in southwest one-fourth of 20 did in fact extend at the time of the survey of 1834-5, and then treat so much of the water of the lake as lies west of that and between that and Hardin's land as a bay, and divide the same on the same principle that the United States Court decided the bay in front east fraction of southeast one-fourth of 30 should be divided.

AS TO SOUTHWEST ONE-FOURTH OF 20.

My conclusion from the evidence is that the point of land extended to about where the northern ditch between the two lakes was cut across at that point, which was about the south line of section 20. There was to the south

a space, a number of rods in extent, which was covered with water. The bay, which existed between this and Hardin's land on the west side of the lake, should be divided between Shedd and Hardin, and each taking in front of his land to the center of the bay. In dividing the bay, the equal division should be made by taking as a guide the meander line so far as shown on the government survey of 1834-5.

AS TO THE RIDGE EXTENDING NORTH FROM THE POINT OF LAND SHOWN ON MAP AS FRACTIONAL SECTION 29.

I find from the evidence that the ridge extended north in varying widths to the north line of southwest one-fourth of 29. That from there north to the south line of section 30 there was no continuous ridge above the water at the time of the survey of 1834-5. Where the south ditch was cut across there was a depression, but I think not sufficient to say there was water at that point from one lake to the other. While the court will regard the evidence as to what land was above water as controlling, yet where there is a doubt, it should be resolved in favor of the shore owner to the extent, at least, of the lowest fraction, into which the government subdivided lands.

Treating then the lake bottom between this ridge and the land on the west shore of the lake, as it was in fact, as a bay, it should be divided between the owners of the land on each side of the bay by a line drawn in the center of the bay. The east fraction of the southeast one-fourth of 30 formed a part of this ridge, exactly how far to the north it constituted a part of the ridge is uncertain from the evidence, but I am satisfied it did not go north of the north line of south one-half of southwest one-fourth of 29. That will be fixed as its north limit, the meander to be used as a guide in making the division, so far as the same is shown on the government survey of 1834-5.

There remains, then, between the south line of section 20 and the north line of southwest one-fourth of 29, a strip of land between Hyde Lake and the state line, which, I find was, at the time of the survey of 1835, practically all covered with water. There may have been

two or three small strips of land not exceeding ten acres in all above the water, insignificant islands. But at the time in question there was but one lake, extending from the west line of Wolf Lake, as shown on the official plat, to the Indiana state line.

The official plat of this survey of 1835 shows Wolf Lake as it existed only to the state line between the States of Indiana and Illinois. Why should not that line be regarded, as to the Illinois shore owners or patentees, as the line limiting their ownership of the bed of the lake? Should not this court in this proceeding, which partakes of the character of a proceeding *in rem*, having jurisdiction only over lands in this state, treat that state line as the line limiting the rights of the Illinois shore owners' ownership of the bed of the lake? So far as the plat shows the lake, we know nothing of it beyond the state line. An Illinois shore owner, it appears to me, can have no claim under such a survey and plat to the bed of the lake, or to the lands uncovered by recession of the waters beyond the state line, or, if he has any, it is not for this court in this proceeding to determine his rights as to land outside of this state.

In any event, a court of chancery, under the peculiar circumstances of this case, should, inasmuch as the evidence shows that a division of the original "navigable lake" by a north and south line would show the middle or center line to be near, but east of the state line, as between the parties to this suit, declare their rights respectively in the bed of the lake and the land uncovered by a recession of the water, up to but not beyond such state line. Assuming this to be equitable as to all the Illinois shore owners, it would follow that Shedd would own east of his strips of land (treating the same as extending to the south line of section 20), all the land and lake bed to the Illinois state line.

Also, he would take all between strips of land in section 29 (treating the strip as extending north to north line of southwest one-fourth of 29) and the Illinois state line.

Hardin would take all between fractional northeast of 30, as shown on official plat of survey of 1835, eastwardly to the state line.

I have been in some doubt as to the propriety of declaring the rights of the parties hereto to the lake bed without the other Illinois shore owners being parties. But if the principles here laid down are correct, the shore owners, not parties, are not injured. In any event, if their rights are affected, the decree cannot prejudice such rights. I am, however, of the opinion that I have power to adjust and settle the rights and equities of the parties hereto. The other shore owners may, perhaps, be bound as parties, styled "unknown owners."

This declaration as to the rights of the parties to the bed of the lake or lakes must not be understood as giving them an absolute ownership thereof like that a party may abquire to the shore land, or that they have acquired to the lands that became or shall hereafter be uncovered by the recession of the waters of the lake. Where a lake lies wholly within the land of one proprietor, it belongs to that proprietor as appurtenant to the land.

Menzies v. *Macdonald,* 2 Macqueen H. L. Cases, 463.
MacKenzie v. *Bankes,* 7 Rettie, 280.

Being a private water, the one proprietor owns and controls, not only the bed of the lake, but also all rights of fishing, boating, taking ice, etc., in regard to the water or use thereof.

But where there are several shore proprietors who own the bed of the lake in severalty to the thread or center, each owns the minerals or the stone which lie in that part of the bed of the lake owned by him in severalty. He owns the moss and has the right to drag for marl within his own lines.

Scott v. *Lord Napier,* H. L. Cases, 7 Macpherson, 35.
Rankine Law Land Ownership, 168-170.
Pomeroy Riparian Rights, p. 46.
Coulson & Forbes on the Law of Waters, p. 98.
Braxon v. *Bresler,* 64 Ills., 488.

And, as in Michigan, the right to build in shoal water docks for shipment of lumber from sawmills, *Rice* v. *Ruddiman*, 10 Michigan, 125, yet there are certain rights as to the water which covers the bed of the lake and the use thereof, which are common to all shore owners.

The water of a lake is first upon one owner's portion of the bed of the lake and the next instant upon another owner's portion, constantly changing and moving, and the fish, *ferae natura*, roam all through such waters; no one shore owner can have an exclusive ownership in either. The exclusive right of the owner to cut ice is the cause of ownership of the bed, and because of the water becoming, by being frozen, fixed and annexed to the soil.

Washington Ice Co. v. *Shortall*, 101 Ills., 429.
Clute v. *Fisher*, 65 Mich., 51.

The right of fishing, boating, logging and other rights which may be exercised upon or over the water, must necessarily be and are common to all the shore owners owning the bed of the lake. There are also certain rights belonging to a riparian owner, which do not depend upon the ownership of the bed of a stream or lake, as the right of access for his cattle and for domestic purposes, etc.

Coulsen & Forbes' Law of Waters, 85, 106, 121, 151.

In *Mackenzie* v. *Bankes, supra*, the court says:

> "There is a common right in a lake. What is that common right, and what is the unity of the lake which gives rise to that common right, and not only gives rise to it, but limits its extent? It must be with reference to the character of the right which is to be exercised. One can understand how this common right has grown up. A person proceeding from property of his own to boat or fish upon a lake, could not be arrested at the *medium filium aquae* of his land, or the moment he traversed the boundaries, which might be drawn on the extreme north or south or the extreme east or west of his lands."

These cases from the House of Lords, and other cases, are decisions as to lakes in Scotland and Ireland, but, I apprehend, announce the rule of the common law. The principles enumerated in the authorities cited are in consonance with what I understand to be the common rights of shore owners in lakes in this country. There are many questions arising in this case that I have not attempted to dispose of, because I deem it unnecessary to do so. A decree may be prepared in accordance with the views expressed, each party to pay his own costs.

Appendix No. 3.

Opinion of Judge Tuley at the second hearing. In the Circuit Court of Cook County.

Fuller *et al.* *vs.* Shedd *et al.* } *Settlement of Decree on Remanding Order by Supreme Court.*

Decision rendered August 10, 1897.

Tuley, J.:

I have held that no new evidence was admissible upon this motion for a decree in accordance with the remanding order of the Supreme Court; that the decree must be upon facts contained in the record and as found by the Supreme Court.

It would be useless for this court to find the facts different from what the Supreme Court has found them to be in its opinion reported in the 161 Ill., 462.

The adjudication of the Supreme Court, both as to the facts and law of this case, is final and must be followed by this court in complying with its mandate to enter a decree in acordance with its opinion.

The question, then, is (1): As to the facts which have been found by that court:

I have studied the opinion of Judge Phillips, filed in this case, with great care, and have concluded that the findings of facts settled by that opinion, as enumerated by the solicitors of Shedd in their brief, are substantially correct. I was of the opinion at the conclusion of the oral argument, and am still of the opinion that the controlling fact found by the Supreme Court, was that prior to the commencement of this suit, what was known at the time of the United States survey in 1834 as Wolf Lake had been for many years divided by a ridge of land whereby the one lake became two lakes, one to the west of the ridge, known as Hyde Lake, and the other to the east as Wolf Lake.

That at the time of the survey referred to, there was a ridge extending from the north side of the lake 220 rods in a southerly direction, and one from the south side of the lake in a northerly direction about 160 rods, leaving eighty or ninety rods between, covered with water in which reeds and coarse grass grew. (The head lands to which these ridges belonged, are owned by Shedd. Hardin owns land upon the west shore of the original Wolf Lake.)

That by the improvement of the Calumet River, into which there was an outlet from the lake, and from natural causes, there had been as early as 1874, a recession of the waters of the lake, causing dry land on both sides of the ridge; that by reason of this ridge the water of what was originally known as Wolf Lake became divided into two lakes, one known as Hyde, and the other as Wolf Lake.

This court, upon the final hearing of this cause, following the decision of the United States Supreme Court in *Mitchell* v. *Smale,* 140 U. S. Rep., and *Hardin* v. *Jordan,* which involved the rights of shore owners upon this same Wolf Lake, that the shore owners holding under the United States survey, owned the bed of the lake to the center thereof, and in making a partition between Hardin and Shedd, and other shore owners, extended the side lines of the sections and fractions thereof as surveyed by the United States to the state line between this state and Indiana, the center of the lake being in the latter state, and just east of such state line.

The Supreme Court of Illinois refused to follow the decisions of the United States Supreme Court, and held the law in this state to be that the shore owners upon a meandered lake, take only to the water's edge, following a prior decision of the court in

Trustees of Schools v. *Schroll,* 120 Ill.

And that while the United States patent to the lands on the meandered lake carried no right to the bed of the lake, it did give the shore owners riparian rights in the lake.

Also, "that when accretions come to such riparian proprietors they shall take to the water's edge and follow the recession of the water." The Supreme Court also held that such riparian owners can follow the water even if the recession go beyond the center of the lake, if there be no corresponding recession upon the opposite side.

This being the finding of the Supreme Court as to the law governing this case, this court must, in applying it, proceed upon the facts found by the Supreme Court as to the existence of the ridge of land by which the original lake became divided into two separate lakes.

The court must, therefore, make the division of the accretions and of the land made by the recession of the waters based upon the fact that by recession of the waters a continuous ridge had been formed from the land of Shedd on the north to his land upon the south side of the lake, whereby what had been surveyed as one lake had become two lakes.

The court in making the division must follow the recession of the water in both lakes. In so doing there can be no application of or room for the application of the doctrine of extension of or from the side lines of original government survey as contended for upon the part of Hardin.

The side lines of the Hardin property on the west side of Hyde Lake cannot upon any reasonable theory be extended across Hyde Lake and over the ridge-land so as to reach the waters of Wolf Lake. His only riparian right is to follow the water in front of his land, to wit: the waters (now) of Hyde Lake.

Ownership of accretions must be by reason of the ownership of the contiguous lands to which the accretions become attached. The accretions or dry land which became a part of the ridge never became attached to the land across the water upon the opposite side of Hyde Lake.

To apply the law as laid down by the Supreme Court of Illinois, the water must be followed and the land made by the recession of the water must be given to the

owner of the land from contact with which the water receded.

The court cannot in making partition make a guess as to how much land Shedd or Hardin should have, but must follow the water and its recession to contiguous land without regard to the quantity of land which will thereby fall to one or the other owners.

I have endeavored to follow the findings of the Supreme Court as to the situation or condition—as shown by the evidence and record in this case—of the waters of what was known originally as Wolf Lake, and have treated the land (covered by water) between the two points or ridges shown in the survey of 1834-5 as having become dry land, by reason of the accretions to or recession of water from contact with said two points or ridges; whereby what was one lake became divided into two lakes, one known as Hyde Lake and the other as Wolf Lake.

Upon that finding I have tried in the division I have made to divide the accretions and new land by following the water in its recession.

I have adopted the findings in the decree prepared by Mr. Shedd's solicitors as being correct, and also have followed the descriptive lines as run by said draft of decree as to Shedd's portion, except that I have extended the line running north between sections 29 and 30, to a point identical with the northwest corner of the southwest quarter of section 29, if fully squared out, thence I have run a line northwesterly at an angle of forty degrees to the waters of Hyde Lake, thence in a northerly or northeasterly direction along the waters of Hyde Lake, as in the original draft.

As to Hardin's land I have extended his north line, commencing at the center of fractional section 19, due east to the waters of Hyde Lake, and thence along the waters on the west side of Hyde Lake in a southerly direction and around the southern extremity of Hyde Lake and following the water in a northerly direction up to the line referred to in the description of Shedd's portion as being drawn at an angle of forty degrees from the

northwest corner of the southwest quarter of section 29 in a northwesterly direction to the waters of Hyde Lake.

After a careful study of the opinion by Judge Phillips, and also of the evidence and all the voluminous and able arguments of counsel, I have concluded that this is the most equitable division I can make, if I follow—as I must—the findings of the Supreme Court.

I have signed the decree amended in the particular points referred to.

Appendix No. 4.

Opinion of Seaman, J.

Circuit Court of the United States for the Northern Dist. of Illinois, N. D.

Gertrude H. Hardin
vs.
Conrad N. Jordan.
} *Consolidated Causes.*

On motion to direct the marshal to refrain from executing the writ of possession as to certain portions of the premises named in the writ, and cross-motion of plaintiff for directions to proceed in the execution.

My impressions at the close of the hearing were, as informally stated, that there was no occasion for any express order in the premises, one way or the other upon the facts shown. But having held the matter open for further consideration I am of opinion, in view of the rule, that *prima facie* all parties entering after suit brought are to be taken as holding possession in subordination to the title of the defendant in ejectment, that a duty rests upon the court to make such order in reference to persons in possession who are not parties to the cause as will restrict the writ to its legitimate function and not leave to the marshal to determine any questions of claim or title extrinsic to his writ. *Hall* v. *Dexter*, 3 Sawy., 434 Fed. Cas., No. 5929.

I have therefore taken into consideration the affidavits and claims presented upon this hearing and my conclusions are:

(1.) That the tenants, William Bush and Frank Schulte, entered into possession during the pendency of this action under the defendant Jordan, and were and are concluded by the judgment. Their attempt to attorn to the claimant, Shedd, after the entry of this judgment is inoperative and cannot save them from the force of the judgment.

(2.) The occupant, Gahanaty, appears to have entered about a year ago, during the pendency of the action, but under Shedd, who claims independent title, antedating this suit. The fact alleged in the affidavit of Mr. Hardin that this portion of the premises was originally in the lease from Jordan to Schulte would not defeat this independent claim in the absence of any showing of actual possession by Schulte and his attornment to Gahanaty. Therefore any subordination to the title of Jordan which would otherwise appear from this later possession, is removed, at least on the face of the showing; and without showing of collusion or priority between Shedd and Jordan or those claiming under him, this possession is not affected by the judgment.

(3.) The occupant, Neubeisser, is alleged to have entered and held under Shedd from April, 1888. Whilst there is some suggestion that there was a previous possession under Jordan through his tenant, Fogli, it is not clearly shown, and there is no showing of priority or collusion. Therefore this possession is not affected by the judgment or writ.

This action is in ejectment and determines only the rights of possession, and incidentally the title as between the parties and those holding under them. A former judgment of this court in favor of the defendant was reversed by the Supreme Court, *Hardin* v. *Jordan*, 140 U. S., 371. The present judgment was entered December 10, 1896, all contest on the part of the defense being withdrawn. It is entirely foreign to this inquiry, whether there was any room for contest, under the opinion and mandate from the Supreme Court, or whether the decision by the Supreme Court of Illinois, upon the same subject in *Fuller* v. *Shedd*, 161 Ill., 462, 44 N. E. Rep., 286, wherein this plaintiff was a party defendant, could be given effect or consideration in the present case. The judgment as entered is undoubtedly conclusive between the parties of record and all holding under them for either title or possession. But of its own force it cannot be regarded as a rule of decision for causes affecting other rights or parties in this court. As between the parties to this action the judgment is determinative until reversed,

set aside or modified; and of course its execution would not abide the action of any co-ordinate court. On the other hand, this proceeding at the foot of the judgment should not operate to extend its force beyond those parties and privies, and does not call for any rule which would affect other parties or actions, either in this or other courts.

This order will be entered: That the writ of possession shall not affect the occupancies of Gahanaty or Neubeisser until the further order of the court in the premises; that the marshal may proceed with its execution as aainst the tenants, Bush and Schulte, but may require from the plaintiff a sufficient bond to indemnify him therein before so proceeding. So ordered.

(Endorsed): Filed February 8, 1897.

S. W. BURNHAM, *Clerk.*